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No. ...-...
IN THE

Supreme Court of the United States

October Term, 1983

KAREN MILLER, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Questions Presented.

I. WHETHER A PRIVATE REMEDY IS IMPLICIT IN THE *HIGHWAY SAFETY ACT*, 23 U.S.C. §401, *et seq.* WHERE THE NEGLIGENCE OF FEDERAL EMPLOYEES IN FAILING TO FOLLOW GUIDELINES ADOPTED BY THE UNITED STATES DEPARTMENT OF TRANSPORTATION CAUSES AN ACCIDENT RESULTING IN A MOTORIST BECOMING A PARAPLEGIC.

II. WHETHER THE CONGRESSIONAL PURPOSE IN ENACTING THE *HIGHWAY SAFETY ACT*, 23 U.S.C. §401, *et seq.* WOULD BE EFFECTUATED BY PROVIDING A PRIVATE REMEDY TO PETITIONER.

III. WHETHER CONSTITUTIONAL DUE PROCESS GUARANTEES WERE VIOLATED WHEN PETITIONER WAS NOT ALLOWED ANY DISCOVERY AND WHERE AN AFFIDAVIT PURSUANT TO *FEDERAL RULES OF CIVIL PROCEDURE* 56(f) WAS PROMPTLY FILED.

IV. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT PERMITTING A STAY OR CONTINUANCE OF THE SUMMARY JUDGMENT PROCEEDING AS REQUESTED BY PETITIONER PURSUANT TO *FEDERAL RULES OF CIVIL PROCEDURE* 56(f).

V. WHETHER THE DISCRETIONARY EXCEPTION UNDER THE *FEDERAL TORT CLAIMS ACT*, 28 U.S.C. §1346, AUTOMATICALLY AND CONCLUSIVELY SHIELDS THE UNITED STATES GOVERNMENT FROM ANY LIABILITY STEMMING FROM THE OPERATIONAL NEGLIGENCE OF RESPONDENT UNITED STATES' EMPLOYEES IN IMPROPERLY INSPECTING AND VERIFYING THE PLACEMENT OF SAFETY DEVICES MANDATED AND COMPELLED BY THE DEPARTMENT OF TRANSPORTATION TO COMPLY WITH THE *HIGHWAY SAFETY ACT*.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Karen and Earl Miller respectfully through their attorneys petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

Opinions Below.

The opinion of the Court of Appeals (Appendix A, *infra*, No. 79-1605, pp. 1-25) is reported at 710 F.2d 656 (10th Cir. 1983). The opinion of the Federal District Court (Appendix B, Transcript of Proceedings on Summary Judgment, *infra*, pp. 26-34) is not reported.

Jurisdiction.

The other parties to this case are Petitioner Earl Miller and Respondent United States of America and the Department of Transportation as well as the National Highway Traffic Safety Administration. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved.

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

2. The *Highway Safety Act* of 1966 as amended and codified at 23 U.S.C. §401 *et seq.*, cited in relevant part in Appendix C.

3. *Federal Rules of Civil Procedure*, Rule 56(f).

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions be taken or discovery to be had or may make such other order as is just."

4. *Federal Tort Claims Act* as amended and codified at 28 U.S.C. §1346 cited in relevant part in Appendix D.

Statement of the Case.

1. On December 18, 1977, Petitioners Karen and Earl Miller were driving eastbound on a Federal Interstate Highway U.S. 6 in Garfield County, Colorado. The Volkswagen Bus in which Petitioners were travelling skidded out of control onto a narrow shoulder then rolled down a steep embankment. There was no guardrail to deflect the vehicle. As a result of the accident, Petitioner Karen Miller is a paraplegic.

2. In 1966, Congress created the *Highway Safety Act* in order to increase highway safety. 23 U.S.C. §401 *et seq.* (1982) (See Appendix C, *infra*). This legislation was motivated to combat the yearly catastrophe occurring on the highways: 47,000 deaths, 1.7 million injuries, economic

loss of 8.1 billion dollars.[1] The *Highway Safety Act* requires each State to have highway safety programs in accordance with the uniform standards promulgated by the Secretary of Transportation. *Id.* at §402(a). The uniform standard shall include provisions for "highway design and maintenance (including lighting, marking and surface treatment)," accident record systems, and "surveillance of traffic for detection and correction of high or potentially high accident locations."[2]

Under the funding provided by the *Highway Safety Act* the Department of Transportation, in conjunction with the Federal Highway Administration, established policies and guidelines to improve the safety conditions on our nation's highways.

By regulations of the Federal Highway Administration in 1975, the following publications were approved, as criteria for application on federal highway projects: (1) The American Association of State Highway Officials', *A Policy on Geometric Design of Rural Highways* (1965) which prescribes ten to twelve foot shoulders on high speed highways (p. 235); standards for shoulder slope (pp. 237-38) and cross slope break between road and shoulder (maximum 6-7%, p. 237); lane widening at curves (pp. 183-89); and placement of guardrails (pp. 242-43); and (2) The Highway Research Board, National Cooperative Highway Research Program (NCHRP) (Report No. 118), location, selection and maintenance of highway traffic barriers (1971) which describes where guardrails should be located (pp. 2-5) 23 CFR §625.3(b)(1), (c)(6) (1975).

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[1]S.Rep. No. 1302, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News, Vol. 2 at 2741, 2748.

[2]*Id.* at p. 2745.

3. Eastbound traffic on U.S. 6 at the accident site is not protected from the steep embankment on the south edge of the eastbound lane. The unpaved shoulder excessively drops approximately 1.3 feet from the north edge of the shoulder to the south edge. The grade slope from the edge of the unpaved shoulder drops over 20 feet in elevation. There is approximately a one foot drop for every 2.4 feet in length. Applying the chart found in the Department of Transportation's own directive at p. 11, it is clear that a guardrail is warranted under circumstances that existed in this subject case. See Appendix E, at p. 11.

4. The subject roadway was funded in part by the United States and first constructed in late 1951. The United States inspected the roadway and approved the project on May 29, 1952. In the early 1970s, U.S. 6 at the accident site was apparently remodeled and/or repaved. Such modification was largely funded, designed and inspected by employees working for Respondent United States. Petitioners were never permitted *any* formal discovery. Petitioners had not been dilatory in their discovery requests which were filed at the outset of the litigation. In fact, the record reveals that only some four months elapsed from the time that the complaint was filed until the District Court granted summary judgment. Petitioners were prohibited from obtaining further and more comprehensive information regarding the type and degree of Respondent's participation in this modification at the accident location by the District Court.

5. In support of its motion to dismiss and/or for summary judgment, the government filed the affidavit of A. J. Siccardi, Division Administrator of the Federal Highway Administration (FHWA) (hereinafter referred to as the "Affidavit").

The Affidavit outlined the statutory procedures for construction of federal aid highways and briefly recounted events

in 1951 and 1952 relating to funding and approval of U.S. 6. No reference was made as to what activities were conducted by the Federal Government when substantial modifications were made to the roadway in the early 1970s prior to this subject accident.

In affirming the decision of the District Court, the Tenth Circuit essentially precludes any imaginable cause of action based on negligence of United States Highway Department employees in failing to follow federal standards. The Tenth Circuit held that any conceivable claim fell within the discretionary function exception of the *Federal Tort Claims Act*. Appendix A, *infra*, 21. Further, the Tenth Circuit held that no private cause of action can be maintained by Petitioners under the *Federal Highway Safety Act*.[3] *Id*. at 22-34.

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[3]The District Court Judge never addressed this issue. See *Miller v. United States of America*, Slip Opinion at 22, Appendix A, *infra*. Also cited at 710 F.2d 656, 667.

REASONS FOR GRANTING PETITION.

1. THE *HIGHWAY SAFETY ACT* CONFERS A PRIVATE RIGHT OF ACTION TO AN INJURED MOTORIST.

This case presents a novel issue of first impression with widespread significance and importance. Since the passage of the *Highway Safety Act of 1966*, as amended, there has never been an action brought to determine the scope of this legislation.

The purpose of the *Highway Safety Act* was to force the Secretary of Transportation to coordinate federal and state governments to increase interstate highway safety by promulgating rules, regulations and standards. These rules, regulations and criteria were to be mandated on federally funded highway projects. The uniform standards must include provisions for accident record systems, surveillance of traffic for detection and correction of high or potentially high accident locations as well as highway design and maintenance criteria. The Secretary developed specific rules to insure the construction of guardrails at hazardous locations.

If the Safety regulations had been followed by the federal employees who inspected U.S. 6 at the accident site when modifications to said roadway were made in the early 1970s, the paralyzing injury to Petitioner Karen Miller would have been prevented. Unless injured victims are entitled to state a private claim against the Respondent, the bureacratic bungling of billions of dollars designed to save thousands of lives and diminish hundreds of thousands of injuries on the nation's highways will continue unabated. Petitioner argues that once the policy and regulations were adopted by officials of the Department of Transportation then negligent application of federal standards by operational employees presents a private right of enforcement through federal courts.

A. Legislative Intent — a Private Remedy Must Be Allowed.

The House of Representatives Report by the Committee of Public Works in 1973 discussed the *Highway Safety Act of 1966*. In that report, the committee found:

> "The benefits accruing from the mobility afforded by our nation's highway systems continue to increase. But, unfortunately, concurrent with the evergrowing product of that system, transportation, we are victims of an almost parallel growth of the system's unwanted byproduct, traffic accidents. Except in a few periods of higher unemployment, the number of deaths occurring as a direct result of the traffic accidents continues to increase. In 1972, over 56,000 lives were lost, almost 4 million people were injured and economic losses estimated in excess of $40 billion dollars were sustained. Now, preliminary figures for 1973 indicate that the death toll will continue to rise at over 4 percent, possibly yielding a toll as high as 58,000 or more traffic deaths. If the current trend continues throughout the remainder of the decade, the gloomy forecast of safety experts of 80 by 80 — meaning 80,000 fatalities by 1980 — could become a grim reality.
>
> This unnecessary killing must stop. The time has come for an end to alarmist rhetoric about highway safety and a firm commitment to realistic programs which will reverse the escalating tide of mayhem on our highways."[4]

Further, the House of Representatives' committee stated:

> "The fundamental problem confronting us is how to transform this knowledge into life-saving programs

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[4]House Comm. on Public Works, Highway Safety Act of 1973, H.Rep. No. 93-118, 93d Cong., 1st Sess. reprinted in 1973 U.S. Code Cong. & Ad. News, Vol. 2 at pp. 1859, 1888-1889.

for the benefit of the American driving public. The Committee believes answers to the problem can and must be found. It feel that a well organized, adequately funded and coordinated attack on all aspects of the causes of death and destruction on the highways of our Nation can significantly reduce, over a fairly short period of time, the number of people killed and injured while driving cars or other vehicles."[5]

The best method of transforming the knowledge of the Secretary of Transportation into life saving programs for the benefit of the American driving public is to allow injured citizens a right to attack in court the operational negligence of employees of Respondent. This will provide a public watchdog to assure governmental efficiency.

The legislative history of this subject act further reveals Congressional concern over the lack of progress in stemming the tragic accidents when in 1973 it reported:

> "Regrettably, only limited progress has been made by the States to date in eliminating such roadside obstacles. A combination of factors is to blame. Federal assistance and leadership has been less than it should have been. Programs have been fragmented and performance has been uneven. What is needed is legislative action to set aside a specific portion of Highway Trust Fund monies to be used for launching a systematic obstacle removal program. The Committee recommends the establishment of such a program. Funding would be at an annual level of $75 million for fiscal years 1974, 1975, and 1976, two-thirds from the Highway Trust Fund, one-third from the General Fund (for expenditure off the Federal-aid System). If the program is fully funded and implemented, a principal cause of needless deaths and injuries will be removed from the

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[5] *Id.* at 1889.

Nation's highways.

In implementing this program, a threshold requirement would be that each State conduct a comprehensive survey to identify roadside obstacles and establish a cost-effective schedule for their removal. The objective would be to focus first on eliminating those with the highest potential for accidents and injuries.

In correcting them, it is intended that a broad range of measures be employed. These would include, but not be limited to, the removal of such fixed objects as trees and headwalls and the replacement of sign posts and light standards with breakaways. *Where required, guardrails could be erected. Such installations have resulted in reduction of 40% of fixed object collisions in California.* Crash cushions could also be installed at elevated gorges, bridges, piers, abutments, and other similar locations. The effectiveness of this type of impact attenuator has been amply demonstrated. One test, for example, showed that of 30 crashes in which a fatality or injury requiring hospitalization would ordinarily have been expected, only three such injuries and one fatality were sustained." (emphasis added).[6]

The foregoing strong language demonstrates that the driving public is to benefit from the millions of dollars spent to increase the safety features on our highways.

At the inception of the *Highway Safety Act*, Congressman Cramer stated:

> "To the extent that there has been governmental leadership in highway safety over the years, it has come from the States. Nevertheless, admirable as the progressive programs in a few States are, they are insufficient and there are far too few of them. Safety has become this year's most popular crusade, which is all

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[6] *Id.* at 1898.

> to the good, but accident reduction is quite another matter. Everyone is eager to participate in the safety dialogue, but there is a curious reluctance to face up to and shoulder the actual burden of reducing highway accidents. It appears that the only solution is a mandatory safety program."[7]

At the time Karen Miller was crippled there were uniform guidelines, rules and regulations which had been promulgated by the Secretary of Transportation to the National Highway Safety Traffic Administration. Sadly, Petitioner Karen Miller can prove that Respondent's failure to follow these rules caused her permanent injuries.

Unfortunately, operational blunders by field inspectors and field construction employees obstruct the successful implementation of Congressional intent. The regulations and guidelines of the Secretary of Transportation are widely disregarded.

By 1972 over 56,000 deaths, 4 million injuries and an economic loss of 40 billion dollars had accrued.[8] In 1978 traffic fatalities on our Nation's freeway system totaled some 50,331.[9] In 1982 fatalities for this same category totaled 43,721.[10]

Legislative intent indicates that Congress directed the Secretary of Transportation to develop and implement a uniform safety program. By as early as ten months after the passage of the act, the Secretary of Transportation had reached a major milestone by promulgating performance

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[7]112 Cong. Rec. 19929 (daily ed. Aug. 18, 1966).

[8]House Comm. on Public Works, Highway Safety Act of 1973, H.Rep. No. 93-118, 93d Cong., 1st Sess. reprinted in 1973 U.S. Code Cong. & Ad. News, Vol. 2 at pp. 1859, 1888.

[9]*Fatal Accident Reporting System — 1981* Accession #DOT-HS-806251, p. 10.

[10]"Highway Safety Facts" Monthly Fatality Report — July 1983: Office of National Center for Statistics and Analysis.

standards. With respect to guardrail placement, a clear ascertainable standard was set. *The Guide for Selecting, Locating and Designing Traffic Barriers* by the American Association of State Highway and Transportation Office was issued May 12, 1977. This book succeeded earlier standards, which had been adopted as Rules, Regulations and Criteria for Department of Transportation employees. A copy of five (5) pages of these regulations are included in this Petition as Appendix E. The crucial section of *The Guide for Selecting, Locating and Designing Traffic Barriers* has apparently been adopted as a directive by the Department of Transportation. See Appendix E, *infra*.

Appendix E, page 11 has figure III-A-1 which is entitled "Warrants for Fill Section Embankments" clearly establish an ascertainable standard as applied to the present case. Simply, the fill section at the Miller accident site is approximately 25 to 30 feet in height. The slope ratio is approximately 2 to 1. Applying the chart found in the Department of Transportation's own directive, it is clear that a guardrail is warranted under circumstances that existed in the Miller case. See, Chart I which is a reproduction of Appendix E, page 11, *infra* at page 12.

Although there is no direct statutory language stating a private cause of action in the *Highway Safety Act*, the importance of the legislation as well as the general legislative intent mandates the granting of a private right to uphold the principles of the act and to insure its *efficient* administration.

The Tenth Circuit mistakenly relied on *Cort v. Ashe*, 422 U.S. 66, 78 (1975) in holding there was no implicit intent

Petitioner utilizes the Warrants for Fill Section Embankments to illustrate the geography at the accident site.

The "Dot" Indicates the height and slope of the embankment which according to this government directive warrants a barrier (guardrail). See, Appendix E, page 11, *infra*.

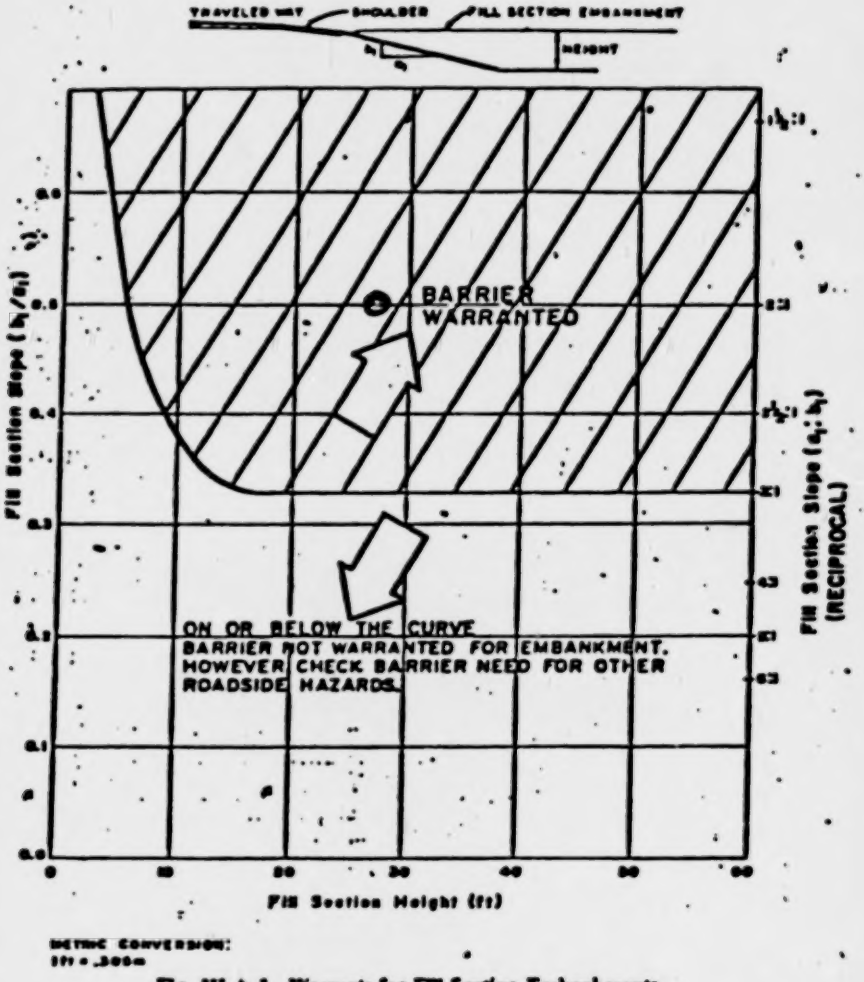

Fig. III-A-1. Warrants for Fill Section Embankments.

CHART I

to create such a remedy. The *Cort* case held that a shareholder's derivative suit alleging violation of campaign contributions in 1972 could not be implied under 18 U.S.C. §610 because that statute primarily was concerned with corporations utilizing their aggregate wealth to become a corrupting influence in national elections and not with damages to shareholders. *Cort v. Ashe*, 422 U.S. 66, 67 (1975).

An implied right does exist. In *Texas and Pacific Railroad v. Rigsby*, 241 U.S. 36 (1916) this Court implied a private right of action to the *Safety Appliance Act*. In *Rigsby* the *Safety Appliance Act* required handrails on trains much in the same manner as the Secretary of Transportation under the *Highway Safety Act* promulgates regulations mandating guardrails at certain hazardous locations. In *Rigsby, supra*, the Court quoted the Doctrine of Common Law expressed in 1 Com. Dig., tit. Action upon Statute (F):

> "So, in every case where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to said law." *Id.* at 39.

Rigsby is on point. Petitioner has been injured by the negligence of the Respondent United States in failing to follow the regulations it promulgated with respect to guardrails when U.S. 6 was reconstructed in 1973. This is precisely the type of harm which the *Highway Safety Act* attempted to curtail and eliminate by the mandates to the Secretary of Transportation to implement uniform standards to protect travelers on the interstate highway system.

B. Petitioner Is One of the Class for Whose Special Benefit the Statute Was Enacted.

There is little doubt from the language of the *Highway Safety Act* that the principal purpose of this law is to provide personal safety for the motoring public. The legislative his-

tory as well as the act itself demonstrates legislative concern over the thousands of deaths and millions of injuries which could be reduced by an efficient and uniform highway safety program. Petitioner Miller is within the class of people for whose benefit this statute was enacted.

In its decision, the Tenth Circuit mistakenly argued that implying such a private remedy would be inconsistent with the purpose of the act. On the contrary, such a remedy will help effectuate the purpose of the act. The private right of action will stimulate compliance. Petitioners are not suggesting that any right exists against the Respondent United States unless the agents of the Department of Transportation *failed* in following the standards or rules implemented by the Secretary of Transportation. Additionally, Respondent Department of Transportation could affirmatively issue a waiver of any regulation in unusual circumstances. A waiver of a regulation at least demonstrates that the purposes of the *Highway Safety Act* were considered and weighed; for instance, in areas that costs of compliance or lack of severe accident statistics support a waiver. Absent a private right of action there is no check and balance to insure that either the Department of Transportation or the State comply or even attempt to implement the subject criteria. The overriding purpose of the *Highway Safety Act* is to ensure safe travel between the states and to reduce the outrageous slaughter occurring on our nation's highways. A uniform system of safety criteria and regulation is the cornerstone of this policy. Granting Petitioners a private right to redress their grievous injury will undoubtedly help promote the spirit and intent of the *Highway Safety Act*.

2. SUMMARY JUDGMENT DEPRIVED PETITIONER OF DUE PROCESS.

The failure of the Federal District Court to stay and/or continue the summary judgment motion and permit Petitioner discovery to counter the Respondent's affidavit was

contrary to the language and spirit of *Federal Rules of Civil Procedure* 56(f). *E.g., Schoenbaun v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968), *en banc cert. denied sub nom., Manley v. Schoenbaum*, 395 U.S. 906 (1969); *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 565 (7th Cir. 1972), *cert. denied*, 410 U.S. 928, 943 (1972).

As the Court of Appeals correctly noted, the Complaint was filed in February of 1979 along with a demand for production of documents, requests for admissions and interrogatories. See Slip Opinion Appendix A at 4. On April 10, at the Government's request, an extension of time to respond to discovery was granted to April 26 for Respondent's compliance with the discovery request. A second stipulation approved by the court on April 11, further extended the time to May 6. *Id.* at 4 fn. 2. The summary judgment motion was granted on May 16, 1979. *Id.* at 6. See Appendix B, *infra*, for transcript of the District Court proceedings on this motion.

One of Petitioner's counsel filed the following affidavit requesting *Federal Rules of Civil Procedure* 56(f) relief:

> "I am opposed to Defendant United States' motion for summary judgment and motion for a stay of discovery proceedings. At this time, I am unable to present by affidavit facts which are essential to justify plaintiffs' opposition. The reason for this is that plaintiffs have not had an opportunity to conduct discovery as authorized by the *Federal Rules of Civil Procedure*. The discovery which is necessary in this matter is in the sole possession of Defendant United States.
>
> Plaintiff's discovery should be allowed to commence until such a time as the discovery process is exhausted. Plaintiffs intend to demonstrate that the actions of Defendant's agents were operational in character and, therefore outside the discretionary exception of the

Federal Tort Claims Act 28 U.S.C. §1346 *et seq.*

Simultaneously with the filing of the Complaint, Plaintiffs served on Defendant a demand for production of documents, requests for admissions and interrogatories. To date, none of this discovery has been answered by Defendants. Plaintiffs will use their diligence in pursuing discovery as demonstrated by the filing of the instant discovery pleading with the Complaint.

Defendant United States' request for a stay of discovery pending summary judgment precludes Plaintiffs from discoverying facts essential to this case. There are several factual questions in dispute which can only be resolved through the utilization of the discovery process."

Where the facts respecting possible operational negligence are solely in the possession of the Federal Government and can be only obtained through discovery, the Summary Judgment Motion should have been denied. *Driscoll v. United States*, 525 F.2d 136 (9th Cir. 1975); *Ward v. United States*, 471 F.2d 667 (3rd Cir. 1973); *White v. United States*, 317 F.2d 13 (4th Cir. 1963); *Huffmaster v. United States*, 186 F. Supp. 120 (N.D. Cal. 1960); *California v. United States*, 151 F. Supp. 570 (N.D. Cal. 1957); *Guy F. Atkinson v. Merritt, Chapman and Scott Corporation*, 126 F. Supp. 406 (N.D. Cal. 1954); *Smith v. United States*, 113 F. Supp. 131 (D. Del. 1953).

In *Ward v. United States, supra*, the United States was sued for injuries allegedly suffered as a result of sonic booms caused by United States Air Force aircraft. The United States moved for summary judgment on the ground that the activities in question fell within the discretionary function exception to the *Federal Tort Claims Act*. In support of the motion, the United States filed numerous affidavits. The

plaintiffs requested a continuance of the Government's Motion for Summary Judgment for the reason that the plaintiffs could not at that time present by affidavits facts essential to justify their opposition to the Motion and that they desired, for that purpose, time for additional discovery pursuant to *Federal Rules of Civil Procedure* 56(f).

The *Ward* court reversed the District Court's granting of summary judgment finding in relevant part that while the Government's affidavits were sufficient to show that the decision to send supersonic flights through the air corridor in question was made in the exercise of a discretionary function, the affidavits were *insufficient to rule out the possibility of operational negligence*. 471 F.2d at 670. The Third Circuit found that facts relating to operational negligence were solely in possession of those in actual control of the aircraft. Therefore, plaintiffs were allowed additional discovery in order to oppose the Motion for Summary Judgment. In the instant case, Petitioner was not allowed *any* discovery.

The Respondent's affidavit of A. D. Siccardi, Division Administrator (FHWA), was filed with their moving papers before the District Court. The affidavit did not establish sufficient facts to make any determination regarding the "planning" versus "operational" controversy. This affidavit was limited to events which occurred prior to June 1952. Major modifications of the roadway took place in the early 1970s and Respondent has monitored this roadway up to and beyond the date of the injuries as alleged in the Complaint. Respondent United States has been successful in suppressing all of these facts which were not considered by the Court.

In *Driscoll v. United States*, 525 F.2d 136 (9th Cir. 1975), an action for wrongful death was brought against the United States under the *Federal Tort Claims Act* wherein it was

alleged that Plaintiff Driscoll, while a civilian employee working on an airforce base, was struck by a car driven by an employee of the United States at an intersection on the airforce base. Plaintiff's Interrogatories were directed to the United States. Of course, the United States moved to dismiss Driscoll's complaint pursuant to a Motion to Dismiss or in the Alternative for Summary Judgment, as Defendant has done in the instant matter. The trial court committed error when it granted the motion. The Ninth Circuit reversed the dismissal, holding that the facts as presented at that stage of litigation were inconclusive and could demonstrate actions at an operational level. In so ruling, the *Driscoll* court stated:

> "A review of the pertinent authorities must begin with *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). Although it has been qualified by subsequent decisions of the Supreme Court, it continues to stand for the proposition that the discretionary function exception is limited to decisions made at the *planning* rather than the *operational* level. *Id.* at 42, 73 S.Ct. 956. Decisions at the latter level may be actionable even though they involved an element of discretion. Distinguishing between the two levels is not easy. Professor Jaffe has suggested in drawing the distinction that consideration be given to such factors as the character and severity of the plaintiff's injury, the existence of alternative remedies, the capacity of a court to evaluate the propriety of the official's action, and the effect of liability on the effective administration of the function in question. See *Jaffe, Suites Against Governments and Officers: Damage Actions*, 77 Harv.L.Rev. 209, 219 (1963).
>
> . . . .
>
> Applying these authorities to the record of this case, and construing the papers of which it consists favorably

to Driscoll, we conclude that the Motion to Dismiss should have been denied. The pleadings, stipulations, and interrogatories do not establish as a matter of law that the decision not to install appropriate warning devices, barriers, speed control devices or cross-walks was made at the *planning* rather than the *operational* level. We hold that the record before us would support a conclusion that the decision was made at the *operational* level. We pass no judgment on whether a more complete development of the facts would alter this view.

Our holding is strongly influenced by our belief that the judicial process is demonstrably capable of evaluating the reasonableness of the failure of the Base Civil Engineer to take the steps that Driscoll alleges were necessary. In addition, we do not believe that this evaluation will impair the effective administration of the Luke Air Force Base, nor will it make the United States liable for large and numerous claims." *Id.* at 138.

This *Driscoll* reasoning, *supra*, was also adopted by the Fourth Circuit in *White v. United States*, 317 F.2d 13 (4th Cir. 1963).

3. THE FEDERAL TORT CLAIMS ACT DOES NOT PRECLUDE AN ACTION AGAINST THE UNITED STATES FOR NEGLIGENCE IN HIGHWAY SAFETY CONSTRUCTION.

The ruling by the Tenth Circuit drastically misapplies this Court's ruling in *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). Effectively, the Tenth Circuit has precluded all plaintiffs from stating a cause of action against the United States based on any alleged negligence of its employees. After all, discovery was precluded in determining the extent of negligence and the level at which negligence occurred, whether that be top or high managerial negligence or low operational negligence. Oth-

erwise stated, under the scope of the Tenth Circuit decision there exist no hypothetical facts which would ever create a cause of action for negligence by the United States actionable under the *Federal Tort Claims Act* with respect to activities concerning interstate highways. For instance, Defendant would be immune from an inspector's negligence in forgetting to follow any number of specific standards. In this case, it is possible that a guardrail was removed during repaving and not replaced by the construction crew or checked by Respondent's employee.

This Honorable Court in *Dalehite v. United States*, 346 U.S. 15 (1953) has established the distinction between planning versus operational acts in determining whether an action comes within the discretionary exception of the *Federal Tort Claims Act*. The court in *Swanson v. United States*, 229 F. Supp. 217 (N.D. Cal. 1964) follows the reasoning in *Dalehite* making the following statement:

> "In a strict sense, every action of a government employee, except perhaps a conditional reflex reaction involves the use of some degree of discretion. The planning level notion refers to decisions involving questions of policy, that is, the evaluation of factors such as financial, political, economic and social effects of the given plan or policy. . . .
>
> The operations level decisions, on the other hand, involved decisions, relating to the normal day-to-day operations of the government. Decisions made at this level may involve the exercise of discretion but not the evaluation of policy factors." *Id.* at 219-20.

Clearly, the Court of Appeals ruling fails to acknowledge that day-to-day inspections by Federal Government employees in the implementation of the exact and discernible standards adopted can indeed involve operational acts actionable under the *Federal Tort Claims Act*.

The Court of Appeals refused to recognize that once a duty of care toward a class of individuals such as a motoring public on interstate roads has been created, that duty of care must be discharged in a non-negligent manner. *Indian Towing Company v. United States*, 350 U.S. 61, 76 S.Ct. 22, 100 L.Ed. 48 (1955). (Coast Guard need not undertake lighthouse services but once they do take over this area and in general reliance on the guidance afforded by the light, they were obligated to use good care.)

There are numerous cases outlining the discretionary demarcation line:

(1) It is discretionary to undertake the following: fire-fighting,[11] control of lighthouses,[12] air-sea rescues,[13] marking of shipwrecks;[14] *however*, it is not discretionary to conduct such activities negligently.

(2) It is discretionary to build a post office; however, failure to install handrails is operational negligence.[15]

(3) It is discretionary to reactivate an airbase; however, negligent construction of a drainage and disposal system is operational.[16]

(4) It is discretionary to establish control towers at airports and to undertake air traffic separation; however, neg-

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[11]*Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed. 2d 354 (1957).

[12]*Indian Towing Company*, 350 U.S. 61, 76 S.Ct. 22, 100 L.Ed. 48 (1955).

[13]*United States v. Lawter*, 219 F.2d 559 (5th Cir. 1955).

[14]*Somerset Seafood Company v. United States*, 193 F.2d 631 (4th Cir. 1951).

[15]*American Exchange Bank of Madison, Wisconsin, United States*, 257 F.2d 938 (7th Cir. 1958).

[16]*United States v. Hunsucker*, 314 F.2d 98 (9th Cir. 1962).

ligent operation of the same is operational.[17]

(5) It is discretionary to set up regulations concerning mininum amounts of insurance for air taxi/commercial operator license certificates; however, failure to follow the standards is operational.[18]

(6) It is discretionary to establish regulations governing the use of canopy guards on government projects; however, failure to apply the regulations is operational.[19]

For these reasons, it is clear that Respondent is not conclusively and automatically protected by the veil of the "planning" exception of the *Federal Tort Claims Act*.

Based on the foregoing, the Tenth Circuit has erred when it mistakenly held that Respondent can *never* be liable for the operational negligence of its employees with respect to operative implementation, construction or design of highways following uniform district standards and regulations.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[17] *Union Trust Company v. U.S.*, 173 F. Supp. 80 (D.D.C. 1953), *affirmed* in part, *reversed* in part on other grounds, *sub nom., Eastern Airlines, Inc. v. Union Trust Company*, 221 F.2d 62 (D.C. Cir. 1955), *affirmed*, 350 U.S. 907 (1955), remanded, 350 U.S. 962 (1956), *affirmed*, 239 F.2d 25 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 942 (1956).

[18] *Hoffman v. United States*, 398 F. Supp. 530 (E.D. Mich. 1975).

[19] *United States v. De Camp*, 478 F.2d 1188 (9th Cir. 1973), *cert. denied*, 414 U.S. 924, 38 L.Ed. 2d 158, 98 S.Ct. 232 (1973).

APPENDIX A.

Slip Opinion.

United States Court of Appeals Tenth Circuit.

Karen Lee Miller, individually; Earl Edward Miller, individually, Plaintiffs-Appellants, vs. United States of America, Department of Transportation, (including the National Highway Traffic Safety Administration), Defendants-Appellees. No. 79-1605.

Filed: June 17, 1983.

Appeal from the United States District Court for the District of Colorado (D.C. No. Civil Action No. 79-K-153).

Jeffrey S. Pop (Thomas G. Hahn of Pop and Hahn, Beverly Hills, California, and Michael M. McGloin of Arkin, McGloin & Davenport, Denver, Colorado, with him on the briefs) of Pop and Hahn, Beverly Hills, California, for Plaintiffs-Appellants.

Sandra Wien Simon (Alice Daniel, Acting Assistant Attorney General, Leonard Schaitman and Robert Kaplan, Attorneys, Department of Justice, Civil Division, Appellate Staff, Washington, D.C., and Joseph F. Dolan, United States Attorney, with her on the brief) of Department of Justice, Civil Division, Appellate Staff, Washington, D.C., for Defendants-Appellees.

Before HOLLOWAY, MC WILLIAMS and BARRETT, Circuit Judges.

HOLLOWAY, Circuit Judge.

Plaintiffs-appellants brought this action under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 *et seq.* (FTCA), and the Federal Highway Safety Act, 23 U.S.C. §§401 *et seq.*, for personal injuries resulting from an automobile accident which occurred December 18, 1977, on U.S. 6 (Interstate 70) in Garfield County, Colorado. Prior to discovery

the district court granted defendant's motion to dismiss, basing its decision on the pleadings and affidavits and thus entering a summary judgment for the defendants on two grounds: (1) that the discretionary function exception, 28 U.S.C. §2680(a), precludes any liability of the United States for its acts or omissions in connection with this cause; and (2) that any negligent acts or omissions of the State of Colorado were those of an independent contractor for whose negligence the United States could not be held liable. We affirm the district court's judgment.

I

Plaintiffs, husband and wife Earl and Karen Miller, were driving their Volkswagen "bus" eastbound on U.S. 6 (Interstate 70), approximately three miles east of the Garfield-Mesa County line in Colorado, near mile marker 67, when the vehicle skidded off the slippery roadway onto a narrow shoulder and down a steep embankment. (Complaint ¶¶7, 8). As a result of this tragedy, Karen Miller is a paraplegic. (Complaint ¶23). Following administrative denial of plaintiffs' tort claims (Complaint ¶9), they filed this action for general damages, medical expenses, property damage, lost earnings, and loss of consortium.

Plaintiffs allege that defendants United States and the Department of Transportation[1] failed to inspect construction plans to assure compliance with the Government's own design criteria as mandated in the National Cooperative Highway Research Program Reports Nos. 54 and 118, as well as other Government manuals and regulations. (Complaint ¶5). Plaintiffs state that the highway "was regulated, in-

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[1]Although the caption of the complaint names the Department of Transportation as a defendant, an action under the FTCA may be brought only against the United States and not against an agency. 28 U.S.C. §2679(a); *Holmes v. Eddy*, 341 F.2d 477, 480 (4th Cir.), *cert. denied*, 382 U.S. 892 (1965).

spected, controlled and designed by Defendant United States, and said Defendant United States was charged with the duty of approving, supervising and inspecting the designing and building of [the highway], as well as monitoring safety features, controlling, maintaining, repairing and keeping in a safe condition [the highway] for the use of the public." (Complaint ¶10). They aver that the United States, in carrying out its duties of supervising, inspecting, designing, building, repairing and maintaining the highway in a safe condition, negligently caused this portion of highway to exist with a deficiently narrow shoulder which sloped excessively away from the roadway; that the highway sloped downhill and that there was a severe dropoff which could not be observed by a motorist exercising reasonable care; that the Government knew or should have known that snow or icy conditions would exist and failed to place signs and negligently allowed the highway to be deceptively marked so as to increase danger to eastbound travelers at or near the accident site; that the defendant United States failed to install a guardrail or other device and failed to correct the defectively designed shoulder. (Complaint ¶¶11-16).

Plaintiffs state that the United States had authority and means available to have posted signs, markings and devices to warn of the dangerous condition and to install guardrails to rectify the condition (Complaint ¶¶18-19); that the Government knew or should have known that the accident site was dangerous and that there had been numerous accidents involving serious injury in the area (Complaint ¶20); that the Government negligently failed to follow its normal and established highway safety criteria, which demand utilization of warning and safety devices such as guardrails on interstate highways at places similar to the site of the accident. (Complaint ¶¶21-22). Plaintiffs allege further during 1970 or 1971 the United States approved construction plans

and provided funding to the State for improvement and widening of U.S. 6 in Garfield County. (Complaint ¶3). The second count of the complaint alleged federal question jurisdiction and asserted a claim under the Highway Safety Act, 23 U.S.C. §§401 *et seq.*, and incorporated the foregoing factual averments. Count three presented a claim against the Government for negligent infliction of emotional distress on Karen Miller. The fourth and fifth counts are Earl Miller's claims against the United States for negligence and loss of consortium.

In February 1979 plaintiffs served their complaint and a demand for production of documents, request for admissions, and interrogatories.[2] The Government filed its motion to dismiss or for summary judgment in April and at the same time requested a protective order staying all discovery, pending disposition of the motion to dismiss.[3] (I R. 11). Plaintiffs responded with an affidavit of counsel requesting a stay of summary judgment proceedings pending completion of discovery, pursuant to Fed.R.Civ.P. 56(f), and outlining the reasons that the plaintiffs could not, without discovery, file responsive affidavits or otherwise be prepared to meet the motion for summary judgment. (I R. 64-65).

In support of its motion to dismiss or for summary judgment, the Government filed the affidavit of A.J. Siccardi, Division Administrator of the Federal Highway Adminis-

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[2]The contents of these discovery requests are not revealed by the record on appeal. The discovery requests were served by certified mail on February 20, 1979. On April 10, at the Government's request, the parties stipulated to an extension of time (to April 26) for the Government's compliance with the discovery requests. A second stipulation, approved by the court on April 11, further extended the time to May 6.

[3]The only basis asserted for the protective order was that disposition of the motion to dismiss or for summary judgment would preclude the need for discovery.

tration (FHWA). (I R. 38; hereafter the Siccardi affidavit).[4] The affidavit outlined the statutory procedures for construction of federal-aid highways and briefly recounted events in 1951 and 1952 relating to funding and approval of the relevant stretch of U.S. 6. A "Project Agreement" dated March 23, 1951, and reflecting the agreement between the United States and Colorado, was attached to the affidavit.[5] (I R. 39-42). Neither the Siccardi affidavit nor the Project Agreement discloses any events after May 29, 1952.[6]

The relevant stretch of highway was constructed in 1951 under the Federal-Aid Highway Act, 23 U.S.C. §§101 *et seq.*, according to the Siccardi affidavit. The State of Colorado determined the location and design of the section of road, acquired the right of way, prepared plans, specifications, and cost estimates, and submitted the same to the Public Roads Administration, Federal Works Agency for approval. (I R. 37-38). Approval was given, thus making

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[4]Thus this motion was a "speaking motion" and is considered as one for summary judgment. Fed.R.Civ.P. 12(b).

[5]While the affidavit recites that a project agreement was entered into between the State and the FWHA, the Project Agreement appears to be between the State and the Public Roads Administration.

[6]The "Project Agreement" contains the following provisions:

> The [Colorado] Highway Department will construct or cause to be constructed to final completion said project, in strict compliance with said plans and specifications, which are by reference made a part hereof, under its direct supervision, which shall include adequate inspection throughout the course of construction, subject at all times to inspection and approval by the Public Roads Administration and in accordance with the laws of said State, Federal regulations hereinbefore mentioned. . . .

I R. 40.

* * *

> The [Colorado] Highway Department will maintain said project in compliance with [the Federal-Aid Highway Act], and acts amendatory thereof or supplementary thereto, . . . [and] the [Colorado] Highway Department will use every means within its power to insure proper and permanent maintenance of said project.

I R. 41.

the project eligible for federal highway funding of approximately 50% of the total estimated cost. (I R. 38, 41). In return for the federal funds, the State contracted to construct and maintain the highway. (I R. 38, 39-42). The State awarded the construction contract, and the Public Roads Administration concurred in the award. (I R. 38). The United States inspected and approved the project in 1952 after construction was completed. (I R. 38).

Before ruling on the discovery matters, the district court held a hearing and announced entry of judgment for defendants on May 16. In his oral ruling the judge stated that his review of the biref of defendant, the Siccardi affidavit and a copy of the project agreement between the Government and the State of Colorado led him "to the conclusion that both the defendants' motion to dismiss for failure to state a claim and the motion for summary judgment should be granted." (II R. 4). The ruling was based on the discretionary function exception of the FTCA, 28 U.S.C. §2680(a), and on the immunity of the Government for acts of Colorado, an independent contractor.

II
THE STATUTORY FRAMEWORK

Two statutory schemes are pertinent to the issues before us. The first, the Federal-Aid Highway Act (the Highway Act), first beginning with enactment of the Federal-Aid Road Act of 1916, and now codified at 23 U.S.C. §§101 *et seq.*, was intended to stimulate and accelerate the nation's developing highway system by providing federal financial aid for approved state highway construction projects. *D.C. Federation of Civic Ass'ns v. Airis*, 391 F.2d 478 (D.C. Cir. 1968). A state seeking funds under this scheme of federal aid must submit a program of proposed projects, together with any required plans, specifications and cost

estimates,[7] to the Secretary of Transportation who may approve them in whole or in part.[8] 23 U.S.C. §105(a). Federal approval of plans and specifications is required for funding. *Id.* at §106(a); 23 C.F.R. §630.203(d) (1977). Approved projects must be "conducive to safety, durability, and economy of maintenance . . . [and] constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality." 23 U.S.C. §109(a)(1),(2). Since 1966 this statute has required the Secretary in approving programs to "give priority to those projects which incorporate improved standards and features with safety benefits." *Id.* at §105(f). Construction standards adopted by the Secretary in cooperation with state highway departments must be applied uniformly throughout the states. *Id.* at §109(b). The location, form and character of informational, regulatory and warning signs on federal-aid highways are "subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways." *Id.* at §109(d).

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[7]The policies and guidance for preparing plans and specifications are found at 23 C.F.R. §630.204 (1977):

> Plans and specifications shall describe the location and design features and the construction requirements in sufficient detail to facilitate the construction, the contract control and the estimation of construction costs of the project. The estimate shall reflect the anticipated cost of the project in sufficient detail to provide an initial prediction of the financial obligations to be incurred by the State and FHWA and to permit an effective review and comparison of the bids received.

[8]Originally federal responsibilities under the Federal-Aid Highway Program resided in the office of the Secretary of Agriculture. They were later transferred to the Secretary of Commerce. When the Department of Transportation was created in 1966, these functions were assumed by the Secretary of Transportation. 49 U.S.C. §1655. The term "Secretary" shall refer to the Secretary of Transportation.

Although approved projects must be "conducive to safety, durability, and economy of maintenance," 23 U.S.C. §109(a)(1), they must also "conform to the particular needs of each locality," *id.* at §109(a)(2), including, for instance, minimization of possible soil erosion. *Id.* at §109(g). The breadth of the various factors Congress requires the Secretary to consider is shown in part by 23 U.S.C. §109(h):

> Not later than July 1, 1972, the Secretary, after consultation with appropriate Federal and State officials, shall submit to Congress, and not later than 90 days after such submission, promulgate guidelines designed to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that final decisions on the project are made in the *best overall public interest*, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects and the following:
>
> (1) air, noise, and water pollution;
>
> (2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services;
>
> (3) adverse employment effects, and tax and property value losses;
>
> (4) injurious displacement of people, businesses and farms; and
>
> (5) disruption of desirable community and regional growth.
>
> Such guidelines shall apply to all proposed projects with respect to which plans, specifications, and estimates are approved by the Secretary after the issuance of such guidelines. (Emphasis added).

Projects may be approved despite nonconformance to design criteria "after due consideration is given to all project conditions such as maximum service and safety benefits for the dollar invested. . . ." 23 C.F.R. §625.5(b)(2) (1977).

Construction of approved highways is undertaken by state highway departments, or under their supervision, and, with one exception not relevant here,[9] is subject to the inspection and approval of the Secretary. 23 U.S.C. §114(a).[10] Construction must be in accord with applicable federal laws and the laws of the state. *Id.* Maintenance is also the duty of the state. *Id.* at §116(a). If the state improperly maintains the highway, the Secretary must give notice to the highway department and if the condition is not rectified in 90 days, the Secretary must withhold approval of projects within the state until proper maintenance is obtained. *Id.* at §116(c).

The second pertinent statutory scheme, the Highway Safety Act, 23 U.S.C. §§401 *et seq.* (the Safety Act), enacted in 1966, directs the Secretary of Transportation to assist and cooperate with federal, state and local Governments, and other interested parties, to increase highway safety. 23

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[9]Under 23 U.S.C. §117, the Secretary may discharge certain responsibilities under the Highway Act by accepting a certification from a state highway department providing the Secretary "finds such projects will be carried out in accordance with State laws, regulations, directives, and standards which will accomplish the policies and objectives contained in or issued pursuant to this title." This certification procedure does not apply to the interstate highway system, such as that portion of highway where plaintiffs were injured.

[10]The regulations discussing this inspection function disclose that "it is the policy of [the Federal Highway Administrator] that FHWA personnel make sufficient inspections of Federal-aid highway construction projects to assure that each project is completed in reasonably close conformity with the approved plans and specifications. . . ." 23 C.F.R. §637.105 (1977). The regulations require an initial and final inspection and permit "other inspections of the type and frequency deemed necessary by the Division Administrator." *Id.* at §637.109(a). The initial and final inspections may be combined on small projects or those of short duration. *Id.*

U.S.C. §401. The Safety Act requires each state to have highway safety programs in accordance with uniform standards promulgated by the Secretary. *Id.* at §402(a). The uniform standards shall include, but not by way of limitation, provisions for "highway design and maintenance (including lighting, markings, and surface treatment)," accident record systems, and "surveillance of traffic for detection and correction of high or potentially high accident locations. . . ." *Id.* The Secretary shall not approve any State highway safety program unless the program provides that the Governor be responsible for administration of the program. *Id.* at §402(b)(1)(A). After 1969, if a state is not implementing such a safety program approved by the Secretary he may not apportion safety funds to that state. *Id.* at §402(c). However, the Secretary is not commanded "to require compliance with every uniform standard, or with every element of every uniform standard, in every State." *Id.*

To implement these statutory provisions, Federal Highway Administration regulations set forth standards, specifications, policies and guides approved for application to federal-aid highways. Highway design standards and specifications are defined as "those design principles and dimensions derived from basic engineering knowledge, experience, research, and judgment that are officially designated and adopted by highway authorities as the specific controls for design of highways." 23 C.F.R. §625.2(a) (1975). Highway design policies are defined as "general procedures and controls which are less specific than design standards, often with a range of acceptable values, and which are officially adopted or accepted for application in the design of highways." *Id.* at §625.2(b). "Highway design guides include information and general controls that are more flexible and indefinite than policies but which are

valuable in attaining good design and in promoting uniformity." *Id.* at §625.2(c).

By regulations of the Federal Highway Administration in 1975, the following publications were approved, *inter alia*, as, respectively a policy and a guide for application on Federal aid projects: (1) the American Association of State Highway Officials', *A Policy on Geometric Design of Rural Highways* (1965), which prescribes 10 to 12 foot shoulders on highspeed highways (p. 235); standards for shoulder slope (pp. 237-38) and cross-slope break between road and shoulder (maximum 6-7%, p. 237); lane widening at curves (pp. 183-89); and placement of guardrails (pp. 242-43); and (2) the Highway Research Board, National Cooperative Highway Research Program (NCHRP) Report No. 118, *Location, Selection and Maintenance of Highway Traffic Barriers* (1971), which was identified in the complaint (¶5; I R. 2) and describes where guardrails should be located (pp. 2-5). 23 C.F.R. §625.3(b)(1),(c)(6) (1975).

The more specific standards and specifications adopted list the AASHO's, *Geometric Design Standards for the National System of Interstate and Defense Highways* (1967) and the Federal Highway Administration's *Manual on Uniform Traffic Control Devices for Streets and Highways* (1971). 23 C.F.R. §625.3(a)(2),(4) (1975). In 1977, the AASHO's *A Policy on Geometric Design of Rural Highways* (1965) and *Geometric Design Standards for the National System of Interstate and Defense Highways* (1967) were approved for application on federal aid highway projects. 23 C.F.R. §625.3(a)(1), (3) (1977). The safety related criteria of the referenced standards were established as "*goals* for developing State and local safety programs for all public highways as required by Highway Safety Program Standard 12, 23 C.F.R. 1204.4." 23 C.F.R. §625.3 (1977). (Emphasis added).

The standards and policies are subject to exceptions. Approval can be given on a project basis to designs not conforming to minimum criteria set forth in the standards and policies listed in 23 C.F.R. §625.3(a) and (b), where, *inter alia*, "unusual conditions warrant that exception be made." 23 C.F.R. §625.4(b)(3) (1975). The exceptions are subject to the following proviso:

> The determination to approve a project design that does not conform to the minimum criteria is to be made only after due consideration is given to all benefits for the dollar invested, compatibility with remaining sections of unimproved roadway, and the probable time before reconstruction of the section due to increased traffic demans . . .

Id. at §625.4(b)(3) (1975); *see also* §625.5(b)(2) (1977) (containing substantially similar language).

III

THE DISCRETIONARY FUNCTION EXCEPTION TO FTCA LIABILITY

We begin by noting that the Federal Tort Claims Act (the FTCA) waives sovereign immunity "in sweeping language," *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951), and authorizes suit against the United States for negligence "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b). The broad waiver of sovereign immunity is limited by the discretionary function exception of 28 U.S.C. §2680(a), *inter alia*.[11] Excep-

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[11]This section states in pertinent part:

> The provisions of [the FTCA] shall not apply to — (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

tions to the FTCA are to be narrowly construed. *First Nat. Bank in Albuquerque v. United States*, 552 F.2d 370, 376 (10th Cir. 1977); *Smith v. United States*, 546 F.2d 872, 877 (10th Cir. 1976). However, the discretionary function exception "poses a jurisdictional prerequisite to suit, which the plaintiff must ultimately meet as part of his overall burden to establish subject matter jurisdiction." *Baird v. United States*, 653 F.2d 437, 440 (10th Cir. 1981); *accord*, *Smith v. United States*, 546 F.2d 872, 875-76 (10th Cir. 1976).

We have said that "[g]enerally speaking, a duty is discretionary if it involves judgment, planning, or policy decisions. It is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level, even if professional expert evaluation is required." *Jackson v. Kelly*, 557 F.2d 735, 737-38 (10th Cir. 1977) (en banc). Stated somewhat differently, we have observed "that if a government official in performing his statutory duties must act without reliance upon a *fixed or readily ascertainable standard*, the decision he makes is discretionary and within the [discretionary function exception]. Conversely, if there is a standard by which his action is measured, it is not within the exception." *Barton v. United States*, 609 F.2d 977, 979 (10th Cir. 1979) (emphasis added). The requirements, duties and functions imposed by the statutes and regulations involved here lead us to the conclusion that the alleged acts and omissions complained of are within the discretionary function exception of 28 U.S.C. §2680(a). The statutes and regulations at issue fail to provide a fixed or readily ascertainable standard, and decisions made pursuant to them require more than expert evaluation of a mandatory duty. *Cf. Griffin v. United States*, 500 F.2d 1059, 1062-65 (3d Cir. 1974).

From the beginning of the federal-aid highway program there has been a preeminent Congressional concern with state autonomy in construction and maintenance, along with the safeguarding of federal funds. *See, Mahler v. United States*, 306 F.2d 713, 716-720 (3d Cir. 1962) *cert. denied*, 371 U.S. 923. The increasing frequency of federal-aid highway safety legislation, culminating for our purposes in the 1966 passage of the Safety Act, has not altered this salient feature. The report accompanying the Safety Act noted that "the [Public Works Committee] draws attention to the need for flexibility in formulating and administering standards in other matters [besides uniform sign, signalling, motor vehicle inspection and driver licensing standards] which are conditioned by topographical differences, traffic loads, or other significant regional variables." S. Rep. No. 1302, 89th Cong., 2d Sess, *reprinted* in 1966 U.S. Code Cong. & Ad. News, 2741, 2745. Flexibility was built into the Safety Act funding provisions which committed 25% of those funds to use at the "administrative discretion" of the Secretary, while requiring 75% to be apportioned on the basis of population. 23 U.S.C. §402(c).[12] While Congress acknowledged the usefulness of uniform standards in enhancing highway safety, it nonetheless did not require the Secretary to demand state compliance with all uniform standards.[13] *Id.*

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[12]In connection with the allocation of 25% of highway safety funds to the Secretary, "[t]he [Public Works Committee] views the discretionary authority of the Secretary as an important and desirable provision. . . ." S.Rep.No. 1302, *supra*, at 2747.

[13]When this "noncompliance" language was added in 1975, the committee reporting the bill stated that its purpose was to "amend section 402 to make it clear that section 402 confers broad discretionary authority upon the Secretary with respect to approval of State highway safety programs. . . ." H. Rep. No. 94-716, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code. Cong. & Ad. News, 798, 819.

Keeping in mind that the Secretary is directed to evaluate each project in light of the "best overall public interest," *see* 23 U.S.C. §109(h), we turn now to the various authorities urged by the parties in determining the scope of the discretionary function exception. We note first our decision in *Wright v. United States*, 568 F.2d 153 (10th Cir. 1977), where we held that §2680(a) barred a suit based on allegedly negligent design, placement, construction, inspection and management of a bridge and its approach roads by the Bureau of Indian Affairs. To be sure, the statutory authorization for federal participation with the State of Utah in the project, 23 U.S.C. §208, was different from the statutory provisions pertinent here. However, in *Wright* we observed that the discretionary function exception applied not only to the "initiation of programs and activities," but also to "determinations made by executives or administrators in establishing plans, specifications or schedules of operations." *Wright*, 568 F.2d at 158, *quoting*, *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953).

We stated that the Bureau of Indian Affair's "decision to aid and assist the State of Utah in constructing the bridge and approach ways in this case comes within the discretionary exemption of the [FTCA, and] neither its adoption *or implementation* of 'plans, specifications, or schedules of operations' for the project gave rise to a viable cause of action. . . ." *Wright*, 568 F.2d at 159 (emphasis added). While *Wright* is distinguishable in some respects from the instant case, and while it relies on three independent theories in reaching its conclusion, it is nonetheless indicative of the scope of the discretionary function exception as it applies to federal activities connected with road building and maintenance.

Plaintiffs place have emphasis on *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974), a decision we have recog-

nized as sound and well-reasoned. *See First National Bank in Albuquerque v. United States*, 552 F.2d 370, 375 (10th Cir. 1977). In *Griffin* the Government argued that §2680(a) barred plaintiffs' action for Government negligence in violating biological standards implemented by the Department of Health, Education and Welfare (HEW) to be used in testing polio vaccine lots for safety. The Third Circuit rejected the Government's construction of the discretionary function exception as too broad. 500 F.2d at 1063. The tests required by HEW, through a promulgated regulation, involved five criteria of a highly scientific nature for evaluating the vaccine's safety. *See, id.* at 1062-65, nn. 7, 11, 12 & 13.

Griffin, we feel, is quite different from the circumstances at hand. Though the Third Circuit noted that evaluation of the vaccine's safety required judgment, it stated: "Where the conduct of Government employees in implementing agency regulations requires only performance of scientific evaluation and not the formulation of policy, we do not believe that the conduct is immunized from judicial review as a 'discretionary function.' " *Id.* at 1066. The court carefully distinguished the situation before it from one involving the balancing of "competing policy considerations in determining the public interest." *Id.* Thus the breach of preexisting statutory and regulatory requirements by the unauthorized reliance on a different factor in releasing the polio vaccine was held to be outside the discretionary function exception in *Griffin*. *Id.* at 1067, 1069. We acknowledge that perhaps discovery herein could reveal, *e.g.*, engineering guidelines with some similarities to the scientific evaluation

called for in *Griffin*. [14] However, we are convinced that the "best overall public interest," the needed flexibility, and the discretionary elements inherent in the federal responsibilities cited by plaintiffs with regard to highways (*see* Part II, supra), call for a markedly different type of evaluation than that undertaken in *Griffin*.[15] We are persuaded

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[14]For instance, Appendix B to Plaintiffs' Supplemental Memorandum relies on a portion of AASHTO's *Guide for Selecting, Locating and Designing Traffic Barriers (1977)*, which sets forth graphs and complex mathematical equations for determining when a guardrail or traffic barrier is warranted. Variables in the graphs and equations include shoulder slope, embankment slope, vehicle velocity, vehicle encroachment angle, shoulder slope tangent point, side slope tangent point, lateral rounding distance, etc. However, as the Government notes, Section I-C to the Guide (entitled "Application of Guide") states in pertinent part (emphasis in original):

> The contents of this document are intended as *guidelines* for those responsible for the design, installation, and maintenance of traffic barriers. . . . [T]he chapter on cost-effectiveness can be used to evaluate the effects of traffic conditions on traffic barrier needs.
>
> . . . It is recognized that limited budgets may preclude the full implementation of these guidelines. In those cases, a priority system should be established to insure that cost-effective alternatives are employed.
>
> The guide relates primarily to the *protective* aspects of traffic barriers. These guidelines must be considered together with social, environmental, and economic factors.

The advisory character of the Guide, particularly when viewed in its statutory and regulatory setting, is therefore quite distinct from the mandatory testing standards at issue in *Griffin*.

[15]Thus we feel *Blessing v. United States*, 447 F.Supp. 1160 (E.D.Pa. 1978), is inapposite. The court there noted that plaintiffs could conceivably demonstrate a breach of OSHA inspection standards that would bring that case within the holding of *Griffin*. *Id.* at 1184. Therefore the Government's Rule 12(b)(1) motion (which was treated as a Rule 12(b)(6) motion) was overruled. We reiterate that further proceedings herein, unlike those allowed in *Blessing*, would be unavailing to plaintiffs under any construction or proof of plaintiffs' allegations when bearing in mind the nature of federal activities related in Part II of this opinion.

(footnote continued on following page)

that the acts and omissions alleged were not violations of specific, mandatory requirements, and they instead did involve policy and competing considerations to such an extent that they were within the discretionary function exception. *See First National Bank in Albuquerque v. United States*, 552 F.2d 370, 375-76 (10th Cir. 1977).

Plaintiffs further argue that the Government's failure to require a warning of the known dangerous condition cannot rationally be dismissed as within the discretionary function exception. *See Smith v. United States*, 546 F.2d 872, 877 (10th Cir. 1976). We are convinced that any such omission respecting warnings is not actionable here.[16] We are guided in part by the reasoning of *Spillway Marina, Inc. v. United*

It should be apparent that the decisions undertaken here are different from the medical decisions in *Jackson v. Kelly*, 557 F.2d 735 (10th Cir. 1977) (en banc). Ordinary medical judgments, such as those in *Jackson*, are unlike the acts or omissions alleged here in that the broad mandate given to the Secretary compels consideration of multitudinous competing policies in arriving at the "best overall public interest," whereas the "discretion" (as that term is used in daily parlance) involved in medical decisions requires determinations no different that those reached by private physicians. *See also*, n.14, *supra*.

[16]The decision in *Smith* was premised on the direct acts or omissions of the Government, through its agents as a landowner. We are mindful that in *Smith* we followed *Foster v. United States*, 183 F.Supp. 524 (D.N.M. 1959), *aff'd per curiam*, 280 F.2d 431 (10th Cir. 1960); *United States v. White*, 211 F.2d 79 (9th Cir. 1954); *Bulloch v. United States*, 133 F.Supp. 885 (D. Utah 1955); and *Worley v. United States*, 119 F.Supp. 719 (D. Or. 1952), on the issue of failure to warn of dangerous conditions. *Smith* 546 F.2d at 877. These decisions were based in material part on either the duties of the Government as a landowner or builder, or on the direct actions of Government agents, once implementation of a policy decision had been undertaken and are, therefore, distinguishable from the instant case. *See, Foster*, 183 F.Supp. at 525 (Bureau of Reclamation contractually bound to perform certain maintenance and construction at canal); *White*, 211 F.2d at 80 (army base); *Bulloch*, 133 F.Supp. at 887 (nuclear detonations); *Worley*, 119 F.Supp. at 720 (Government hunter sets coyote trap during federal eradication program). *See also, Driscoll v. United States*, 525 F.2d 136 (9th Cir. 1975); *Ward v. United States*, 471 F.2d 667 (3d Cir. 1973); and, *American Exchange Bank v. United States*, 257 F.2d 938 (7th Cir. 1958) (examples of potential breaches of Government duties imposed on the Government as landowner, builder or aircraft operator).

States, 445 F.2d 876 (10th Cir. 1971). The plaintiff there sued the Government for damages to its facility on the Tuttle Creek Reservoir, sustained when the Army Corp of Engineers released waters from the reservoir to aid navigation on the Missouri River. The complaint alleged, *inter alia*, breach of a duty to warn plaintiff. *Id.* at 877. We held that the water release was a discretionary function and that the alleged failure to warn "goes to the manner of exercise of a discretionary function," which is immunized from suit by §2680(a). *Id.* at 878; *see also Smith*, 546 F.2d at 877 (discussing *Spillway Marina*). In reaching that conclusion, we distinguished *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). We feel that *Spillway Marina*'s discussion of *Indian Towing* is equally pertinent here.

The alleged negligence here concerning warnings, as with our preceding treatment of federal responsibilities, is not confined to the operation of a federal facility, enterprise or undertaking but rather goes to the essence of the Secretary's judgment in fashioning a highway in the "best overall public interest" out of the welter of public policy considerations Congress has designated. *See Baird v. United States*, 653 F.2d 437, 440-42 (10th Cir. 1981), and cases cited therein; *First National Bank in Albuquerque v. United States*, 552 F.2d 370, 375-76 (10th Cir. 1977); *cf. Yates v. United States*, 497 F.2d 878, 882-83 (10th Cir. 1974).[17] We are

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[17]In *Baird*, we held that §2680(a) barred suit against the Government for the Inter-Agency Air Cartographic Committee's preparation of a misleading flight chart. *Baird's* instructive discussion of authorities distinguished the "situation where negligence is confined essentially to the operation of a government facility or enterprise" from "deliberative and judgmental activities in designing and approving" flight charts. *Baird*, 653 F.2d at 441.

The tragic injuries befalling plaintiffs in *First National Bank* were excepted from suit under the FTCA, we held, because the warning and labelling requirements at issue there "called for a judgment in the discretionary area." *First National Bank*, 552 F.2d at 376. It is true that the regulations and requirements for labels there appear far more generalized than those applicable here to the Department of Transportation and its agents. *See id.* at 372-75. Nonetheless we feel that our discussion in Part II of this opinion adequately illustrates the inherent discretionary quality of the federal responsibilities allegedly breached, despite the presence of a more specific statutory and regulatory framework.

constrained to hold that §2680(a) bars the plaintiffs' claims asserted under the Federal Tort Claims Act due to the nature of the Secretary's acts in arriving at the "best overall public interest," which implicated the several policy considerations imposed on the Secretary.

The plaintiffs argue vigorously that the district court abused its discretion by denying them the right to conduct discovery prior to ruling on the Government's motion for dismissal. As noted, the district court conducted a hearing in May 1979. The Government attorney requested an opportunity to argue the motion for a protective order, but the judge announced instead that he was prepared to grant the Government's motion to dismiss. He stated oral findings and conclusions explaining his ruling. Actually, the ruling as made was a summary judgment since the judge referred to matters beyond the complaint, such as the agreement with the State of Colorado. In essence the court held that the plaintiffs' claims could not be asserted under the Federal Tort Claims Act since the matters complained of came within the discretionary function exception. The court further held that the United States was not liable for any action by the State of Colorado on the highway project because it occurred while the State was functioning as an independent contractor. (II R. 2-10).

The plaintiffs say that the court abused its discretion by making the ruling before they were allowed to conduct discovery; that a stay of the summary judgment proceeding should have been permitted pursuant to Rule 56(f), F.R.Civ.P.; that, as stated in counsel's Rule 56(f) affidavit, the plaintiffs intended by discovery to demonstrate that the actions of the Government's agents were operational in character and therefore outside the discretionary exception; and that none of the discovery requests of the plaintiffs had been met by the Government. The plaintiffs argue on appeal in

their Supplemental Memorandum that if discovery were permitted they would demonstrate, *inter alia*, that the highway at the accident site was void of "proper" warning signs and that the Department of Transportation employees failed to follow their agency's guidelines and criteria when they inspected and constructed the highway. (*Id.* at 2).

We are not persuaded that the district judge committed any prejudicial error here in making his ruling before discovery by plaintiffs was permitted. It is true that discovery is strongly favored and generally denying the right to have full discovery on all pertinent issues before a summary judgment is granted would be error, particularly in the face of a Rule 56(f) affidavit. However, in the instant case we are convinced that there are no facts which plaintiffs could arguably develop to escape the effect of the statutes and regulations. The statutes, regulations and all the publications referred to in the regulations were, of course, available to both sides and the pattern they reveal is one coming within the discretionary function exception. While portions of the standards, specifications, policies, and guides deal with the specifics of engineering criteria for highways, they are not prescribed as mandatory standards such as would bring these claims within the theory of the *Griffin* case, but are instead part of the overall regulatory scheme involving policy decisions and competing considerations.

In sum, we hold that the plaintiffs' claims asserted under the Federal Tort Claims Act are within the discretionary function exception and that the district court properly dismissed them.

IV
PLAINTIFFS' CLAIMS ASSERTED UNDER THE SAFETY ACT

In the second count of the complaint, plaintiffs invoke federal question jurisdiction and assert a claim under the Safety Act, with no allegation of jurisdiction under the

FTCA. (Complaint ¶29). We note that the district court did not separately address this independent cause of action in its oral statement announcing its ruling against plaintiffs. We assume that the court was following its general reasoning that no viable claim could be asserted by plaintiffs based on alleged negligence in the Government's functions in connection with the highway system.

The Safety Act does not expressly provide a private cause of action in favor of an aggrieved party for the breach of duties imposed by the Act. Our inquiry becomes, then, whether a private cause of action ought to be implied from the statute. We are guided in this inquiry by the factors adumbrated in *Cort v. Ash*, 422 U.S. 66, 78 (1975).[18] Subsequent formulation and refinement of the *Cort* criteria have indicated that a Congressional intent to create or deny the private remedy asserted is the weightiest factor. *Middlesex Cty. Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) ("[T]he key to the inquiry is the intent of the legislature."); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979).

From its language, there can be little doubt that the principal purpose of the Safety Act was to enhance the personal

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[18] In *Cort*, the Supreme Court stated:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States so that it would be inappropriate to infer a cause of action based solely on federal law?

442 U.S. at 78. (citations omitted; emphasis in original).

safety of the motoring public. However, we decline to leap from such a proposition to the conclusion that by enactment of the Safety Act "Congress intended to create, either expressly or by implication, a private right of action." *Touche Ross*, 442 U.S. at 575. Rather, it appears that Congress sought to regulate through the incentive of financial aid the previously unregulated activities of state highway departments for the protection and benefit of the separate and distinct classes of highway users, pedestrians, bicyclists and others mentioned in the statute. We note that the Safety Act is phrased more as a general prohibition or command to a federal agency, rather than as an act focusing unmistakably on the benefitted class. *See Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772 (1981). The discussion in *Cannon v. University of Chicago*, 441 U.S. 677, 689-94 & n.13 (1979) (*see also* cases cited therein), is pertinent in this context. There the Court observed that it "has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large." *Id.* at n.13. Given the benefits accruing to motorists through increased safety on federal-aid highways, it is nonetheless not apparent that "Congress intended to confer federal rights upon those beneficiaries." *California v. Sierra Club*, 451 U.S. 287, 294 (1981). The Safety Act, we feel, reflects broad societal concerns and lacks the specialized focus, protections or benefits apparent in those statutes where a private remedy has been implied.

Second, the parties have not directed us toward, nor has our independent research uncovered, an explicit or implicit indication of legislative intent to create such a remedy. We acknowledge that this is typically the situation where the legislation in question does not expressly create or deny a private remedy. *Cannon*, 441 U.S. at 694. *Compare Pushkin v. Regents of University of Colorado*, 658 F.2d 1372,

1380 (10th Cir. 1981) (clear Congressional intent to create private right of action), *with Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890, 894 (10th Cir. 1972), *cert. denied*, 409 U.S. 1042 (absence of Congressional intent). However, here we think the pervading legislative purpose disclosed by the historical materials was to encourage research, development and application of safety measures by a financial incentive system to be executed through the state highway departments.

Next, *Cort* directs that we consider whether implying a private remedy against the Government is consistent with the underlying purposes of the Act. Allowing such recovery by the tens of thousands of injured motorists and pedestrians would be beneficial from the standpoint of compensation to them. It would, however, mean an obviously enormous governmental exposure to liability, and we doubt that such a result is consistent with what Congress sought to do by its scheme of beneficial regulations geared to specific appropriations and the apportionment of limited safety funds. Hence we do not feel that this factor militates in favor of implying private rights of action against the Government under the Safety Act.

Finally, *Cort* directs our inquiry into the question whether the claim is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort*, 422 U.S. at 78. Generally, the primary resource for redressing tortious wrongs arising out of automobile accidents is the state civil codes and common law. Such actions are not within the familiar domain of federal interests. However questions underlying the recognition of a right to recover from the Government for such injuries are unique, and hence we do not feel that this last factor is a helpful guide here. These questions are unique because recognizing the right to recover sought here would also

involve finding a waiver of the Government's traditional immunity from suit. We are reminded that the United States "is immune from suit save as it consents to be sued," *United States v. Mitchell*, 445 U.S. 535, 538 (1980), *quoting United States v. Sherwood*, 312 U.S. 584, 586 (1941), and "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocably expressed.' " *Mitchell*, 445 U.S. at 538, *quoting United States v. King*, 395 U.S. 1, 4 (1969). We find no such unequivocal waiver in the provisions of the Safety Act.

In sum, we cannot agree that the Safety Act affords a remedy to the plaintiffs on these claims against the Government.

V

For these reasons we agree with the conclusion reached by the district court. We are convinced that the claims asserted under the Federal Tort Claims Act come within the discretionary function exception and that no private cause of action can be maintained by the plaintiffs under the Federal Highway Safety Act. Accordingly the judgment is

AFFIRMED.

APPENDIX B.

Transcript of Proceedings.

In the United States District Court for the District of Colorado.

Karen Lee Miller, Individually, Earl Edward Miller, Individually, Plaintiffs, vs. United States of America, Department of Transportation, (including the National Highway Traffic Safety Administration), Defendants. Civil Action No. 79-K-153.

Proceedings before the HONORABLE JOHN L. KANE, JR., Judge, United States District Court for the District of Colorado, for hearing on all pending motions, commencing at 8:40 a.m. on May 16, 1979, in Courtroom 200, United States Courthouse, Denver, Colorado.

APPEARANCES

MICHAEL M. McGLOIN, ESQ., Denver, Colorado, and JEFFREY S. POP, ESQ., Beverly Hills, California, appearing for Plaintiffs.

MARY L. GRAD, Trial Attorney, United States Department of Justice, Washington, D.C., appearing for Defendants.

PROCEEDINGS

THE COURT: I'm sorry to be late. We have had a judges' meeting and I have a jury trial. I am prepared to make a ruling in Miller versus United States, 79-K-153.

MS. GRAD: Your Honor, could I request a moment to at least argue the motion, or present it?

THE COURT: What motion?

MS. GRAD: I am prepared on the motion for protective order.

THE COURT: I am not going to rule on that. I am going to grant the motion to dismiss. This will constitute

my findings of fact and conclusions of law and I am not going to write an opinion in this case.

Plaintiffs are California citizens who have filed this action pursuant to the Federal Tort Claims Act and the Federal Highway Safety Act for personal injuries. The action arises from an automobile accident on December 18, 1977, when plaintiffs were driving eastbound on U.S. 6 and/or Interstate I-70 in Garfield County, Colorado.

The Volkswagen bus that plaintiffs were driving skidded off a slippery roadway, onto a shoulder and down an embankment. Plaintiffs seek to recover for injuries sustained, and the injuries are significant and terrible. It's alleged that the plaintiff, Mrs. Miller, is now a quadraplegic.

Plaintiffs allege that since the highway was constructed with federal grant-in-aid funds, the United States is liable for their injuries on the theory that the government negligently supervised, inspected and approved the design, construction and maintenance of the segment of the highway.

Defendants have responded to the complaint by filing a Motion for Protective Order requesting that all discovery be stayed pending the disposition of defendants' Motion to Dismiss or, in the alternative, for summary judgment. Both motions were filed on April 23, 1979. Since the discovery motion is contingent upon the Motion to Dismiss, the substantive motion shall be considered first.

Defendants argue that (1) the complaint fails to state a claim upon which relief can be granted, (2) the court lacks jurisdiction under the Federal Tort Claims Act, (3) that the court lacks subject matter jurisdiction because there was no negligent or wrongful act within the Federal Tort Claims Act, (4) that the court lacks jurisdiction over the United States under Colorado law, and (5) that the Department of Transportation is not a proper party.

Defendants base their motion on the assertion that the responsibility for the design, construction, maintenance and operation of the federal interstate highways is vested in the State of Colorado by the Federal Aid Highway Program. A review of the brief filed by the defendants, the affidavit of the Division Administrator of the Department of Transportation, and a copy of the project agreement entered into by the federal government and the State of Colorado, leads me to the conclusion that both the defendants' motion to dismiss for failure to state a claim and the motion for summary judgment should be granted.

Plaintiffs allege that as a result of the United States' negligence in construction, maintenance and operation of the highway, they sustained damages for personal injuries.

The Federal Tort Claims Act effects a general waiver of the federal government's sovereign immunity as to all tort claims except those falling within certain specified categories. One of these categories is contained in Section 2690(a) and relates to claims based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or of employees of the government, whether or not the discretion involved is abused." This exception is commonly called the "discretionary function" exception to the Federal Tort Claims Act.

In *North v. United States*, 94 F.Supp. 824 from the District of Utah in 1950, which involved the construction of a dam, the court expressed the purpose of this exception under Section 2680(a) — excuse me, 90 — as immunization of the United States from liability resulting from "the formulation, expression, and application of governmental policy."

This discretionary function exception has been uniformly held applicable to cases involving the construction or main-

tenance of highways constructed with federal funds, and so to protect the government from any liability asserted against it as a result of its participation in such construction or maintenance. The following case are examples of these holdings:

The court, in *Mahler v. United States*, 306 F.2d 713, a 1962 3rd Circuit case, cert. denied 371 U.S. 923, said that the government could not be held liable under the Federal Tort Claims Act for its participation in the formulation of the plans for, and subsequent approval of, a grant-in-aid highway alleged by the claimant to have been defectively constructed. The court affirmed the trial court's judgment denying the claimant recovery for damage he suffered when his vehicle collided with a boulder on the highway, ruling that the federal government's participation in the project fell within the "discretionary function" exception to 28 U.S.C. Section 2680(a).

A determination by the Secretary of Commerce to approve the plans and specifications for an interstate highway, the court said in *Daniel v. United States*, 426 F.2d 281, a 1970 5th Circuit case, was a planning or discretionary function, not an operational function, and therefore the United States was not liable for injuries in an automobile accident allegedly caused by the unsafe and inadequate design of a traffic separator on the interstate highway. The court noted that the design of the separator was but one of many specifications for the project and was a discretionary function within the meaning of 28 U.S.C. Section 2680(a).

A suit against the United States under the Federal Tort Claims act was discussed in *Rayford v. United States*, 410 F. Sup. 1051 (M.D. Tenn. 1976). There, plaintiff alleged negligence in design, construction, approval and maintenance of a federal aid highway by the United States and constructed by the state. The court said that the relatively

passive role of the United States under the Federal Aid Highway Act was insufficient to bring it within the liability provisions of the Federal Tort Claims Act, and that the government's activities fell within the discretionary function exception of 28 U.S.C. Section 2680(a).

Similarly, in *Delgadillo v. Elledge*, 337 F. Supp. 827, from the Eastern District of Arkansas, decided in 1972, the court granted the government's motion to dismiss holding that the requirements of the Federal Aid Highway Act for approval of highway projects and for their inspections did not impose duties on the part of the United States for the benefit of the traveling public so as to render the United States liable for deaths of motorists for failure to provide for and make inspections in connection with adequate signs after the construction was completed. The court ruled that the discretionary function exception in the Federal Tort Claims Act applied where the complaint alleged negligent planning, approval, inspection and maintenance of the highway project.

Finally, the function of the United States in planning, engineering, grading and paving a highway was held to be discretionary and within the pertinent exception of the Federal Tort Claims Act in *Sisley v. United States*, 202 F. Supp. 273, from the District of Alaska, 1962, where recovery for damage to claimant's property was caused when the highway interrupted the natural flow of surface water away from it and it was denied.

The agreement for the segment of highway in question in this action provides that the State of Colorado shall, and I quote:

> ". . . construct or cause to be constructed to final completion said project, in strict compliance with plans and specifications, which are by reference made a part hereof, under its direct supervision, which shall include

> adequate inspection throughout the course of the construction, subject at all times to inspection and approval by the Public Roads Administration and in accordance with the law of said State, [and] Federal regulations herein mentioned . . ."

As the defendants' brief notes, the State of Colorado additionally agreed to:

> "Maintain said project in compliance with [the provision of the act of Congress approved July 11, 1916 (39 Stat., 355)], and acts amendatory thereof or supplementary thereto, out of funds which have been or will be made available therefore by said State in the manner herein set forth, to wit: Chapter 124, Session Laws of 1935, approved April 4, 1935.
>
> The Highway Department [of the State of Colorado] will use every means within its power to insure proper and permanent maintenance of said project."

Under Section 2671 of the Federal Tort Claims Act government contractors are specifically excluded. Defendants correctly argue that "Under Colorado law, when a contractor has sole and exclusive right in all essential respects to control the manner in which the work is done, the contractor is independent and not an employee of the party who lets the contract." And that's *Sevit Inc. v. Western Stock Center, Inc.*, 559 P.2d 1118, a 1976 decision of the Colorado Court of Appeals and affirmed at 578 P.2d 1045 by the Supreme Court in 1978.

Since the Federal Aid Highway Act specifies that states shall have the exclusive role on matters of highway construction and maintenance, the State of Colorado is clearly an independent contractor of the United States. The United States is thereby excluded from liability under the Federal Tort Claims Act for acts of the state, an independent con-

tractor of the federal government.

Defendant's motion to dismiss should be granted since plaintiffs base their complaint on the fact that the United States paid for part of the highway on which they had the accident. It is clear from case authority cited above that the United States cannot be held liable on such a theory and that the discretionary function exception of the Federal Tort Claims Act bars liability.

Judgment of dismissal will enter, each party to pay their own costs.

MR. McGLOIN: Am I correct in my assumption that this is a dismissal with prejudice and a final order?

THE COURT: Yes, it's final. You may appeal.

MR. POP: I would like to point out, for the record, that while you make the decision on what was put forth in defendant's summary judgment motion, I have personal knowledge, at least, that in 1973, that portion of the road was rebuilt. We don't know how much at this point, how much involvement the federal government had in rebuilding it. We know that they paid for it.

We know, also, that at that the time the Federal Highway Safety Act was in effect. We know, also, that at that time it had criteria which, if you put it down on this table, it would take three-quarters of the table or six or eight feet long, of written criteria of how to build a highway.

We know that the Department of Transportation has that obligation to impose upon a state to check the highways. We also know at this time that the Department of Transportation has accident research people who go over the highways and check accidents and the areas. All of these facts, and more facts we can bring out, I think we should be allowed to argue.

THE COURT: I know. I am in great sympathy. The discretionary function test applies. The injuries which your clients have received are substantial and tragic. Nevertheless, I think that's the law and simply doesn't matter about this —

MR. POP: Discretionary function, Your Honor, goes to the theory of is it discretionary and the *Dalehite* case says it's discretionary if it's planning and not operation. If we show operational facts, it shouldn't be discretionary.

THE COURT: Well, I think the Court of Appeals will consider that matter. Anything else?

MR. McGLOIN: No.

THE COURT: Court will be in recess.

(Proceedings were then concluded at 8:50 a.m. on Wednesday May 16, 1979.)

* * * * *

REPORTER'S CERTIFICATE

I, LOLITA HURST, Certified Shorthand Reporter, State of Colorado, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that thereafter my shorthand notes were reduced to typewritten form, comprising the foregoing transcript of proceedings; further, that the foregoing is a full and accurate record of the proceedings in this matter on the date set forth.

Dated at Denver, Colorado, this 17th day of May, 1979.

/s/ Lolita Hurst
LOLITA HURST, C.S.R.

APPENDIX C.

Highway Safety Act.

§401. Authority of the Secretary

The Secretary is authorized and directed to assist and cooperate with other Federal departments and agencies, State and local governments, private industry, and other interested parties, to increase highway safety. For the purposes of this chapter [23 USCS §§401 et seq.], the term "State" means any one of the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and American Samoa, except that all expenditures for carrying out this chapter [23 USCS §§401 et seq.] in the Virgin Islands, Guam, and American Samoa shall be paid out of money in the Treasury not otherwise appropriated.

§402. Highway safety programs

(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary. Such uniform standards shall be expressed in terms of performance criteria. Such uniform standards shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance and bicycle safety. In addition such uniform standards shall include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (in-

cluding lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, and emergency services. Such standards as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations. The Secretary shall be authorized to amend or waive standards on a temporary basis for the purpose of evaluating new or different highway safety programs instituted on an experimental, pilot, or demonstration basis by one or more States, including, but not limited to, such programs for identifying accident causes, adopting measures to reduce accidents, and evaluating effectiveness of such measures, where the Secretary finds that the public interest would be served by such amendment or waiver.

(b)(1) The Secretary shall not approve any State highway safety program under this section which does not—

(A) provide that the Governor of the State shall be responsible for the administration of the program through a State highway safety agency which shall have adequate powers, and be suitably equipped and organized to carry out, to the satisfaction of the Secretary, such program.

(B) authorize political subdivisions of such State to carry out local highway safety programs within their jurisdictions as a part of the State highway safety program if such local highway safety programs are approved by the Governor and are in accordance with the uniform standards of the Secretary promulgated under this section.

(C) provide that at least 40 per centum of all Federal funds apportioned under this section to such State for

any fiscal year will be expended by the political subdivisions of such State in carrying out local highway safety programs authorized in accordance with subparagraph (B) of this paragraph.

(D) provide for comprehensive driver training programs, including (1) the initiation of a State program for driver education in the school systems or for a significant expansion and improvement of such a program already in existence, to be administered by appropriate school officials under the supervision of the Governor as set forth in subparagraph (A) of this paragraph; (2) the training of qualified school instructors and their certification; (3) appropriate regulation of other driver training schools, including licensing of the schools and certification of their instructors; (4) adult driver training programs, and programs for the retraining of selected drivers; (5) adequate research, development and procurement of practice driving facilities, simulators, and other similar teaching aids for both school and other driver training use, and (6) driver education programs, including research, that will assure greater safety for bicyclists using public roads in such State.

(E) provide adequate and reasonable access for the safe and convenient movement of physically handicapped persons, including those in wheelchairs, across curbs constructed or replaced on or after July 1, 1976, at all pedestrian crosswalks throughout the State.

(F) provide for programs (which may include financial incentives and disincentives) to encourage the use of safety belts by drivers of, and passengers in, motor vehicles.

(2) The Secretary is authorized to waive the requirement of subparagraph (C) of paragraph (1) of this subsection, in whole or in part, for a fiscal year for any State whenever he determines that there is an insufficient num-

ber of local highway safety programs to justify the expenditure in such State of such percentage of Federal funds during such fiscal year.

(c) Funds authorized to be appropriated to carry out this section shall be used to aid the States to conduct the highway safety programs approved in accordance with subsection (a), including development and implementation of manpower training programs, and of demonstration programs that the Secretary determines will contribute directly to the reduction of accidents, and deaths and injuries resulting therefrom. Such funds shall be subject to a deduction not to exceed 5 per centum for the necessary costs of administering the provisions of this section, and the remainder shall be apportioned among the several States. For the fiscal years ending June 30, 1967, June 30, 1968, and June 30, 1969, such funds shall be apportioned 75 per centum on the basis of population and 25 per centum as the Secretary in his administrative discretion may deem appropriate and thereafter such funds shall be apportioned 75 per centum in the ratio which the population of each State bears to the total population of all the States, as shown by the latest available Federal census, and 25 per centum in the ratio which the public road mileage in each State bears to the total public road mileage in all States. For the purposes of this subsection, a "public road" means any road under the jurisdiction of and maintained by a public authority and open to public travel. Public road mileage as used in this subsection shall be determined as of the end of the calendar year preceding the year in which the funds are apportioned and shall be certified to by the Governor of the State and subject to approval by the Secretary. The annual apportionment to each State shall not be less than one-half of 1 per centum of the total apportionment. After December 31, 1969, the Secretary shall not apportion any funds under this subsection to any

State which is not implementing a highway safety program approved by the Secretary in accordance with this section. For the purpose of the seventh sentence of this subsection, a highway safety program approved by the Secretary shall not include any requirement that a State implement such a program by adopting or enforcing any law, rule, or regulation based on a standard promulgated by the Secretary under this section requiring any motorcycle operator eighteen years of age or older or passenger eighteen years of age or older to wear a safety helmet when operating or riding a motorcycle on the streets and highways of that State. Implementation of a highway safety program under this section shall not be construed to require the Secretary to require compliance with every uniform standard, or with every element of every uniform standard, in every State. Funds apportioned under this section to any State, that does not have a highway safety program approved by the Secretary or that is not implementing an approved program, shall be reduced by amounts equal to not less than 50 per centum of the amounts that would otherwise be apportioned to the State under this section, until such time as the Secretary approves such program or determines that the State is implementing an approved program, as appropriate. The Secretary shall consider the gravity of the State's failure to have or implement an approved program in determining the amount of the reduction. The Secretary shall promptly apportion to the State the funds withheld from its apportionment if he approves the State's highway safety program or determines that the State has begun implementing an approved program, as appropriate, prior to the end of the fiscal year for which the funds were withheld. If the Secretary determines that the State did not correct its failure within such period, the Secretary shall reapportion the withheld funds to the other States in accordance with the formula

specified in this subsection not later than 30 days after such determination.

(d) All provisions of chapter 1 of this title [23 USCS §§ 101 et seq.] that are applicable to Federal-Aid primary highway funds other than provisions relating to the apportionment formula and provisions limiting the expenditure of such funds to the Federal-aid systems, shall apply to the highway safety funds authorized to be appropriated to carry out this section, except as determined by the Secretary to be inconsistent with this section, and except that the aggregate of all expenditures made during any fiscal year by a State and its political subdivision (exclusive of Federal funds) for carrying out the State highway safety program (other than planning and administration) shall be available for the purpose of crediting such State during such fiscal year for the non-Federal share of the cost of any project under this section (other than one for planning or administration) without regard to whether such expenditures were actually made in connection with such project and except that, in the case of a local highway safety program carried out by an Indian tribe, if the Secretary is satisfied that an Indian tribe does not have sufficient funds available to meet the non-Federal share of the cost of such program, he may increase the Federal share of the cost thereof payable under this Act to the extent necessary. In applying such provisions of chapter 1 [23 USCS §§ 101 et seq.] in carrying out this section the term "State highway department" as used in such provisions shall mean the Governor of a State for the purposes of this section.

(e) Uniform standards promulgated by the Secretary to carry out this section shall be developed in cooperation with the States, their political subdivisions, appropriate Federal departments and agencies, and such other public and private organizations as the Secretary deems appropriate.

(f) The Secretary may make arrangements with other Federal departments and agencies for assistance in the preparation of uniform standards for the highway safety programs contemplated by subsection (a) and in the administration of such programs. Such departments and agencies are directed to cooperate in such preparation and administration, on a reimbursable basis.

(g) Nothing in this section authorizes the appropriation or expenditure of funds for (1) highway construction, maintenance, or design (other than design of safety features of highways to be incorporated into standards) or (2) any purpose for which funds are authorized by section 403 of this title [23 USCS § 403].

(h) [Repealed]

(i) For the purpose of the application of this section on Indian reservations, "State" and "Governor of a State" includes the Secretary of the Interior and "political subdivision of a State" includes an Indian tribe: Provided, That, notwithstanding the provisions of subparagraph (C) of subsection (b)(1) hereof, 95 per centum of the funds apportioned to the Secretary of the Interior after date of enactment, shall be expended by Indian tribes to carry out highway safety programs within their jurisdictions: And provided further, That the provisions of subparagraph (E) of subsection (b)(1) hereof shall be applicable except in those tribal jurisdictions in which the Secretary determines such programs would not be practicable.

(j) The Secretary of Transportation shall, not later than September 1, 1981, begin a rulemaking process to determine those programs most effective in reducing accidents, injuries, and deaths. Such rule shall be promulgated taking into account consideration of the States having a major role in establishing these programs. Not later than April 1, 1982,

the Secretary shall promulgate a final rule establishing those programs determined most effective in reducing accidents, injuries, and deaths. Before such rule shall take effect, it shall be transmitted to Congress. If such rule is not transmitted by April 1, 1982, it shall not take effect before October 1, 1983. If such rule is transmitted by April 1, 1982, it shall take effect October 1, 1982, unless before June 1, 1982, either House of Congress by resolution disapproves such rule. If such rule is disapproved by either House of Congress, the Secretary shall not apportion or obligate any amount authorized to carry out this section for the fiscal year ending September 30, 1983, or any subsequent fiscal year, unless specifically authorized to do so by a statute enacted after the date of enactment of the Omnibus Budget Reconciliation Act of 1981 [enacted Aug. 13, 1981]. When a rule promulgated in accordance with this subsection takes effect, only those programs established by such rule as most effective in reducing accidents, injuries, and deaths shall be eligible to receive Federal financial assistance under this chapter [23 USCS §§ 401 et seq.].

APPENDIX D.

Federal Tort Claims Act.

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b] Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting

within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

APPENDIX E.

Guide for Selecting, Locating, and Designing Traffic Barriers.

PART I — GUIDELINES

III. ROADSIDE BARRIERS

A roadside barrier is a longitudinal system used to shield vehicles from hazards in the roadside. It may also be used to shield hazards other than opposing traffic in extensive areas between divided highways. It may occasionally be used to protect pedestrians and "bystanders" from vehicular traffic. It is the purpose of this chapter to delineate criteria pertinent to the various elements of design, including warrants, structural and safety characteristics of operational systems, maintenance characteristics of operational systems, a selection procedure, placement recommendations, and guidelines for upgrading substandard installations.

III-A. Warrants

Highway hazards that may warrant shielding by a roadside barrier can be placed in one of two basic categories: embankments and roadside obstacles. Pedestrians or "innocent bystanders" may also warrant protection from vehicular traffic. The highway features contained in each of these categories are discussed in the following sections.

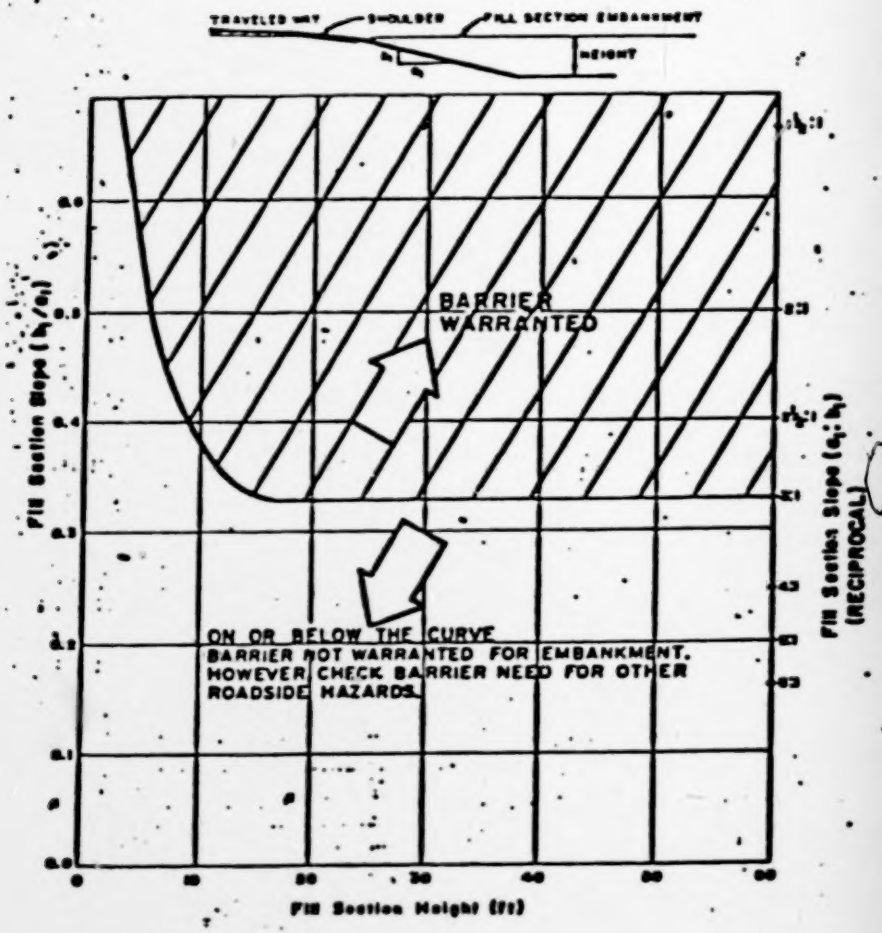
Historically, roadside barrier warrants have applied to highways designed for vehicle speeds of approximately 50 mph (80.5 km/h) or greater. This guide generally reflects such practices. However, an effort has been made in the guide to recognize conditions on lower speed and lower volume highways. For example, Figure III-A-3 shows clear zone widths for different speeds and Table III-E-1 suggests different criteria for determining the length of need for roadside barriers on the basis of different speeds and traffic volumes. In addition Section III-E-4 provides a method for adjusting clear zone width on the basis of traffic volumes.

Nevertheless, for very low volume or low speed conditions the designer may consider amending these warrants. In this regard, the procedure presented in Chapter VII can be used to evaluate barrier needs as related to traffic conditions. This procedure is included as an alternate or optional approach to the establishment of barrier need.

III-A-1. *Embankments*

Height and slope of the embankment are the basic factors in determining barrier need for a fill section (an embankment that slopes downward). Warranting criteria for fill sections are shown in Figure III-A-1. The criteria are based on studies of the relative severity of encroachments on embankments versus impacts with roadside barriers (*8, 9, 10*). Embankments with slope and height combinations below the curve do not warrant protection. Obstacles on the slope may, however, warrant protection. The criteria in Section III-A-2 should be used in such cases. Embankments with slope and height combinations above the curve warrant protection.

Recent studies (*11*) have shown that rounding at the shoulder and the toe of an embankment can reduce its hazard potential. Rounded slopes reduce the chances of an errant vehicle becoming airborne, thereby reducing the hazard of the encroachment and affording the driver more control over the vehicle. Figure III-A-2 illustrates shoulder rounding parameters and it contains suggested equations for determining the rounded profile. The equations can be used to determine the lateral extent of rounding needed, d_r, and the elevation, y, of the rounded portion as a function of the lateral distance, x. Rounding may be determined for any combination of shoulder slope, side slope, and vehicle encroachment conditions. A limited number of studies have shown that approximately 80 percent of errant vehicles leaving the roadway on high speed facilities do so at an encroachment angle of approximately 15 degrees or less. Unless more definitive

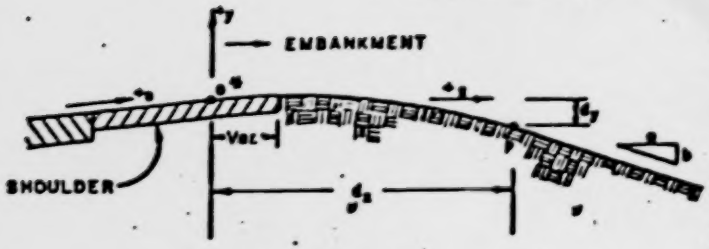


METRIC CONVERSION:
1ft = .305m

Fig. III-A-1. Warrants for Fill Section Embankments.

11-

NOTE: BEGINNING OF ROUNDING MAY BE WITHIN SHOULDER WIDTH, IF DESIRED, PROVIDED SLOPE OF SHOULDER DOES NOT BECOME EXCESSIVE.



ROADSIDE ELEVATION

EQUATIONS

	Metric	
$y = x\left[e - \frac{6.9x}{V^2\sin^2\theta}\right]$, $0 \le x \le d_x$	$y = x\left[e - \frac{2.1x}{V^2\sin^2\theta}\right]$, $0 \le x \le d_x$	(III-A-1)
$d_x = \frac{V^2\sin^2\theta}{13.8}\left[e - \frac{b}{a}\right]$	$d_x = \frac{V^2\sin^2\theta}{4.2}\left[e - \frac{b}{a}\right]$	(III-A-2)
$d_y = d_x\left[e - \frac{6.9d_x}{V^2\sin^2\theta}\right]$	$d_y = d_x\left[e - \frac{2.1d_x}{V^2\sin^2\theta}\right]$	(III-A-3)
y, x, d_x, and d_y in feet.	y, x, d_x, and d_y in meters.	

where, e = shoulder slope (ft/ft) [m/m], positive if sloping upward;

$\frac{b}{a}$ = embankment slope (ft/ft) [m/m], negative if sloping downward;

V = vehicle velocity (ft/sec) [m/s]; and

θ = vehicle encroachment angle (deg), or the angle between vehicle heading and tangent to roadway.

"o" = shoulder slope tangent point, and origin of x-y axis.

"p" = side slope tangent point.

Fig. III-A-2. Rounding Parameters and Equations.

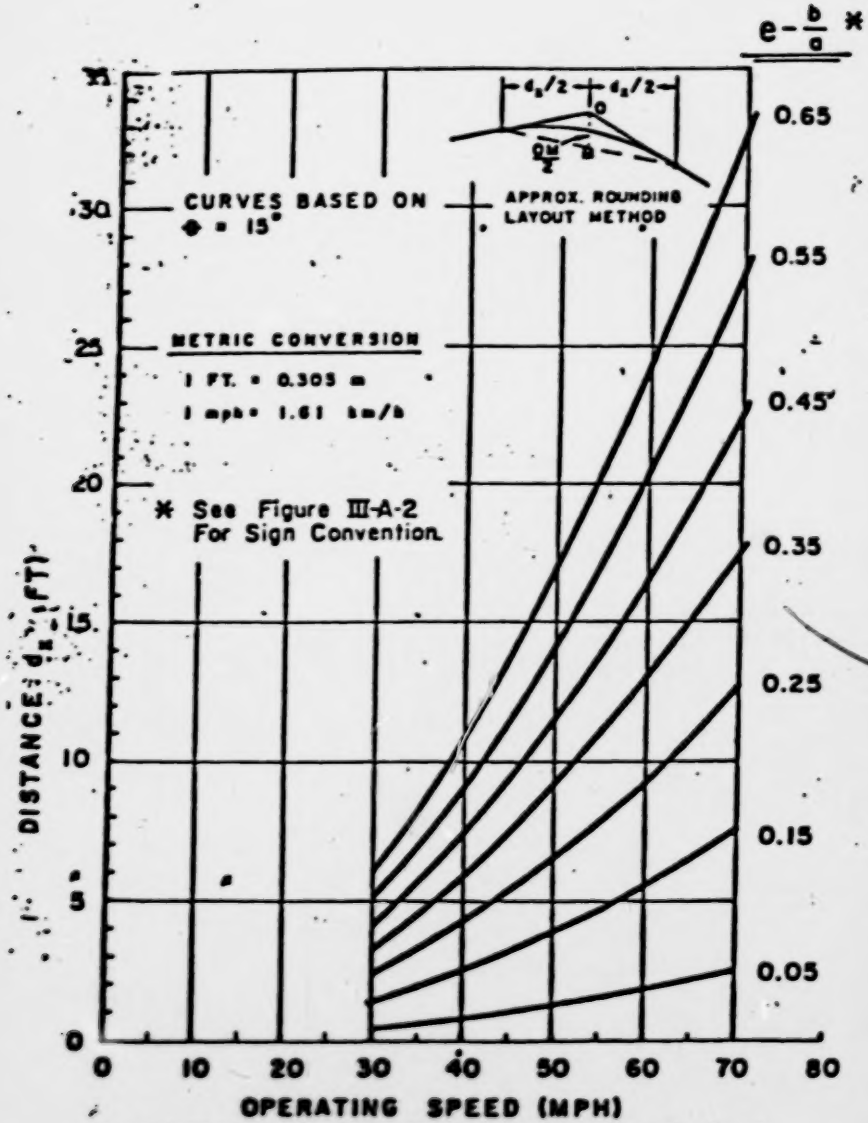


Fig. III-A-2(a). Lateral Rounding Distance, d_s, Versus Operating Speed.

data is available an encroachment angle of 15 degrees is suggested for design purposes. Application of the equations is illustrated in the following two examples.

Example 1:

Given:

$e = -0.04$ ft/ft (shoulder sloping downward);

$\frac{b}{a} = -1/3$ (3 to 1 side slope);

$V = 60$ mph (96.6 km/h) = 88 ft/sec (26.8 m/s);

$\theta = 15$ degrees.

Thus,

$$y = x\left[-0.04 - \frac{6.9x}{(88)^2(\sin 15^\circ)^2}\right]$$

or

$$y = x\,[-0.04 - 0.0133x]$$

and

$$d_x = \frac{(88)^2(\sin 15^\circ)^2}{13.8}\,[-0.04 + 0.333]$$

or

$$d_x = 11.0 \text{ ft } (3.4 \text{ m}).$$

Also,

$$d_y = 11\,[-0.04 - 0.0133(11.0)]$$

or

$$d_y = 2.0 \text{ ft } (0.6 \text{ m})$$

Elevation of the rounded profile is as follows:

x(ft)	2.0	4.0	6.0	8.0	10.0	11.0
y(ft)	−0.13	−0.37	−0.72	−1.17	−1.73	−2.05

Example 2:

Given:
Same parameters as Example 1 except $e = +0.05$ (shoulder sloping upward).
Thus,

$$y = x\,[0.05 - 0.0133x]$$

$$d_e = \frac{(88)^2(\sin 15°)^2}{13.8}\,[0.05 + 0.333]$$

$$d_e = 14.4 \text{ ft } (4.4 \text{ m})$$

$$d_e = 14.4\,[0.05 - 0.0133\,(14.4)]$$

$$d_e = 2.0 \text{ ft } (0.6 \text{ m})$$

Elevation of the rounded profile is as follows:

x(ft)	2.0	4.0	6.0	8.0	10.0	12.0	14.0
y(ft)	+0.05	−0.01	−0.18	−0.45	−0.83	−1.32	−1.91

Values of the distance d are given in Figure III-A-2(a) as a function of operating speed and $(e - b/a)$. All of the curves are based on an encroachment angle of 15 degrees.

Rounding at the toe of the slope is also desirable to minimize the hazard at the side slope to ground line hinge. The degree of rounding at the toe should approximate that at the shoulder. Unrounded slopes of 3:1 and flatter need not be shielded. In view of the possible safety benefits, slope rounding should be considered in the design process.

III-A-2. *Roadside Obstacles*

A clear, unobstructed, flat roadside is highly desirable. When these conditions cannot be met, criteria to establish barrier need for shielding roadside objects are necessary. Roadside obstacles are classified as *nontraversable hazards* and *fixed objects*. These highway hazards account for over thirty percent of all highway fatalities each year and their *removal should be the first alternative considered*. If it is not feasible or possible to remove or relocate a hazard, then a barrier may be necessary. *However, a barrier should be installed only if it is clear that the barrier offers the least hazard potential.*

Barrier warrants for roadside obstacles are a function of the nature of the obstacle and its distance from the edge of the traveled way. Figure III-A-3 shows suggested criteria for determining the clear zone on fill and cut sections for three different vehicle operating speeds. Clear zone is defined as the roadside border area, starting at the edge of the traveled way, available for safe use by errant vehicles. Nontraversable hazards or fixed objects should be removed, relocated, or shielded by a barrier if they are within the indicated minimum clear zone width.

The criteria of Figure III-A-3 are based on an assumed shoulder width of approximately 12 feet (3.66 m) for unrounded sections. Shoulder rounding is assumed to start 10 feet (3.1 m) from the edge of pavement and to be in accordance to the criteria given in Figure III-A-2 with θ = 15 degrees and $e = -0.04$. It should also be noted that the clear zone criteria assume that the obstacle or hazard is located on the embankment or the side slope. When the obstacle is located within the ditch or at ground level an approximate procedure, given in the "*Section A-A*" example of Section III-A-7, may be used to determine the clear zone width. Further information on run-off-the-road accident studies can be found in the literature (*7, 10, 12, 16, 144*).

The procedure for use of Figure III-A-3 is as follows:

(1) Select appropriate curve based on given operating speed.

(2) Locate the point on the figure whose coordinates are the distance from the traveled way to the obstacle in question (horizontal axis) and the slope of the embankment (vertical axis).

(3) If this point lies below or to the right of the curve, a barrier is not warranted. If it lies above or to the left of the curve, a barrier may be warranted, depending on the nature of the obstacle.